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CONVEYANCER'S NOTEBOOK

This twelfth volume of the new series of the *Conveyancer* opens under the shadow of an economic crisis and the weight of two of the most momentous statutes affecting the land law that have been passed by Parliament. For purely technical reasons the impact of the Property Legislation of 1925 afflicted the profession in a much greater degree than the Town and Country Planning Act, 1947, and the Agriculture Act, 1947, both of which received the Royal Assent this August. The 1925 Acts were expected to make immediate and major changes in conveyancing practice and, in fact, were expected to have a more wholesale effect on the forms of conveyancing than ultimately was found to be the case. No such result is contemplated from the new Acts. They may be regarded as matters primarily for the official and not for the ordinary lawyer. In large measure this is true enough. For the most part the first step is with the official, and the landowner or occupier will be compelled to fall in behind whether he likes it or not. Here the lawyer may help him to object effectively—if objection can be taken—but this is not primarily the business of the conveyancer and we suspect that a very large part of this work will fall into the hands of the land agent. We would suggest respectfully that the profession should be on guard to prevent more than the proper share of the work falling into those hands as, at least some lawyers think, has happened in connection with accountants and revenue law.

It is always dangerous to prophesy, and in these days peculiarly so, but we venture to think that the ultimate effect of these new Acts will be much more far-reaching than the 1925 Acts. The 1925 Acts were conveyancing machinery. They introduced or confirmed certain conveyancing practices, but save in a few cases had little effect on the land law. In a technical sense we do not seek to minimise those changes, some of which were not anticipated (or so we think), but they did not go to the roots of the land law. These new Acts are of a different calibre. They are not just "lawyer's law". They go to the root of landownership and bear comparison with such landmarks as *Quia Emptores*, the Statute of Uses, and the Abolition of Military Tenures

Act. The conveyancing changes that will follow in their train may be more gradual than those of Real Property reforming statutes, such as the Conveyancing Act, 1881, and the Settled Land Act, 1925, but we think that they may cut much deeper. The forward looking practitioner, therefore, will give them at least the same deep attention which he paid to the 1925 Legislation and this will involve a study of implications by no means apparent on the surface. We think the time not far distant when the traditional books on real property will be scrapped. When that happens perhaps it may also be necessary to produce a wholly new series of precedents.

Departmental registers.—There are repeated statements about the shortage of manpower. The Agriculture Act contemplates a register of " owners of land and other persons who are trustees of or interested under settlements kept by the Minister " : section 21 (4). The Coal Commission had a register under the Coal Act and the Town and Country Planning Act provides for a register of owners and persons interested for the purposes of that Act. More than one committee has reported in favour of compulsory registration of all titles under the Land Registration Act. Surely a central registry could be maintained more economically. If special details are required, *e.g.*, by the Minister of Agriculture in some cases he could specify what they were and the register could in that respect be kept accordingly. It might avoid not only overlapping and waste of manpower but inconsistency in the registers.

Rents and inflation.—Our contemporary the *Estates Gazette* in two articles headed " Gold Clause in Leases " in issues dated August 2 and 16 has drawn attention to a problem which confronts landlords with the continuing fall in the value of rentals. The problem is, of course, most serious in the really long leases, but values change so fast at the present time that shorter periods are affected. In the past the landowning class generally may not have suffered from the steady decline in the value of money so much, because of the " unearned increment " of what is now called " development value ". Indeed, some landlords have become very rich in consequence. This is to be a thing of the past under the Town and Country Planning Act and, therefore, it is only to be expected that landlords should seek to protect the income value of their landed investments. Two difficulties arise. First, the difficulty of providing a satisfactory sliding scale for the rent. Secondly, to find something by which the scale can be measured. The obvious course would be that of the cost of living index, but this index is not at present published, but there is a temporary Index of Retail Prices. It is vital that the rent should be fixed with certainty otherwise trouble is certain. We propose to return to this subject in another issue, but if in the meantime any of our subscribers have been faced with this problem we should welcome their views. A suggested form is published in this number.

Death duties and annuities.—Our contemporary the *Law Times* (Vol. 204, p. 6) prints from a correspondent certain figures concerning the effect of doubling the legacy duty on annuities. Bearing in mind that the legacy duty is payable in four annual instalments it appears that in some cases the annuitant may actually be out of pocket during those four years.

With the kind permission of the *Law Times* we reproduce the figures. They relate to a single woman, a stranger to the testator and, of course, the annuity is not given free of duty.

	Aged 30	Aged 50
Annuity	£300	£300
Income Tax at 9s. in the £	135	135
Net income	165	165
Tax recoverable if *sole* source of income ...	75 15s.	75 15s.
	£240 15s.	£240 15s.
Capitalised value according to annuity tables	£4,932	£3,726
Legacy duty at 20 per cent.	986	744
Four yearly instalments	246	180

It will be observed that in either case the annuitant would be out of pocket if she had another source of income so that there was no relief from tax. But the really serious case normally, though a woman of thirty can be a hopeless invalid, is that of the woman of fifty who is left with £54 per annum for the first four years.

We would suggest that testators should always be discouraged from giving annuities in the 10 per cent. and 20 per cent. cases and should be advised instead to bequeath such a sum as will at the testator's death purchase an annuity of £— and, if so desired, direct the executors to purchase an annuity. In these circumstances the legacy duty may be paid out of the sum and the annuity correspondingly reduced, but the reduction will be felt much less because it will be spread out over the term of the annuity.

THE TWILIGHT OF LANDOWNING

The Agriculture Act is primarily a social and economic measure, if not in purpose then in fact. It bears the same relation to the modern law of agricultural land as that borne by the Statute *Quia Emptores* in 1290 to all land not held of the Crown. The abolition of sub-infeudation and the free alienation of the fee simple, later developed by barring the entail, completely changed the character both of the land law and of the property-owning classes. In 1290 freedom of alienation was conferred on all tenants in fee simple as the price of maintaining the size of the feudal revenues of the great lords, or as we should now say, the virtual governors of England. This abolition of sub-infeudation stereotyped the services due from freeholding tenants and in time rendered the services virtually unimportant. The government and economic system of England ceased, in fact, to be maintained by the services due from landholders and the economic system

became commercial instead of feudal. In 1947 we see something remarkably like a reversal of this whole policy. The Government is to determine the proper use and, in some circumstances, even the proper user of the land. Freedom of alienation may to some extent remain, but it is limited in scope and purpose. And the ultimate sanction is analogous to the old forfeiture to the Crown except that now the Minister will have to pay for the land he acquires compulsorily.

When the barons persuaded Edward I to pass the statute *Quia Emptores* we may be very sure that they had no notion of the economic and social changes that were to follow in its train—aided and abetted by the Black Death and other economic crises of the fourteenth and fifteenth centuries. It is probable that the Commons took no part in the passage of the statute of *Quia Emptores* and, therefore, they can scarcely be held to account for the breakdown of one system of government. We mention this, because we suggest with all deference that the legal changes introduced by the Agriculture Act may not be less far-reaching in their ultimate result. All we can do in this article is to make a tentative survey of the major operation that is being performed. At the same time we should make it clear that we are expressing no opinion on whether the changes are good or bad—these are political matters on which we do not care to express any opinion. We may, perhaps venture one remark. Vitally speaking the changes indicate greater development and control of land under the authority of central planners. Now it has fallen to our lot in the last few years to entertain a number of intelligent overseas visitors, mostly from the Dominions of Canada and Australia, and to get to know them over an extended stay in England in the services. We have entertained them in our country home in a house miles from any railway station and even more miles from anything like a sizeable town. In this rural England we are apt to be met on the first arrival of such visitors with doubts about the absence of central heating, plumbing and other amenities that the modern civilisation of the Dominions brings with it—in most cases. But as the months go by the hold of the English countryside grips them (and the more intelligent the tighter the grip) and they will admit that it has something they do not find elsewhere. The "green and pleasant land" that is rural England was made by the hands of numberless folk, each working his own way and in his own fashion—it is the very irregularity and homeliness that seems to be at the root of this charm for those who know other lands. It may not be so efficient in the supply of grain; cattle may not be herded, milked and slaughtered with the same speed and economy of manpower, but we may hazard the suggestion that this smiling, almost lazy, happy-go-lucky countryside has bred the men who stood alone in the gate against the embattled might of Hitler—and did not stand in vain. We may be permitted to hope that in the exercise of the powers of this new Act designed for the more economical use of our plough and pasture these things may not be forgotten.

CONTROL OF AGRICULTURAL LAND

The Agriculture Act, 1947, is concerned with "agricultural land" which is defined (section 109 (1)) as "land used for agriculture which is so used for the purposes of a trade or business or which is designated

by the Minister for the purposes of this sub-section and includes any land so designated which in the opinion of the Minister ought to be brought into use for agriculture: Provided that no designation shall extend—(a) to land used as pleasure grounds, private gardens or allotments, or (b) to land kept or preserved mainly or exclusively for the purposes of sport or recreation except where the Minister is satisfied that its use for agriculture would not be inconsistent with its use for the said purposes and it is so stated in the designation". By section 109 (3) "agriculture" includes "horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds and the use for woodlands where that use is ancillary to the farming of land or other agricultural purposes".

This Act covers a very wide part of the surface of England and potentially it can be made wider by "designation". Its provisions fall roughly into three groups: (i) the considerable alterations in the law of agricultural tenancies and modifications of the Agricultural Holdings Act contained in Part III and the relevant schedules; (ii) development of the law of small holdings which is Part IV and relevant schedule; (iii) the control of management and farming with compulsory powers of direction and acquisition and other machinery, Parts II and V and relevant schedules. In place of the freedom of alienation offered as consideration in 1290 we find the promise of guaranteed prices and assured markets in Part I. With Part I we are not concerned as a matter of land law and conveyancing, and it is hoped to deal with agricultural tenancies and small holdings in other articles. Here we are concerned with the lynch pin of the whole new system, the powers of management, control and acquisition. It is these powers that may herald a new era in land law.

Good Estate Management and Good Husbandry

Part II opens with an unusual kind of section which heretofore would normally have seemed more in place in a preamble. Section 9 reads as follows: "The following provisions of this Part of this Act shall have effect for the purpose of securing that owners of agricultural land fulfil their responsibilities to manage the land in accordance with the rules of good estate management and that occupiers of agricultural land fulfil their responsibilities to farm the land in accordance with the rules of good husbandry". The section does not purport to command or to authorise anything. It is by way of recital of the purposes of Part II. However, these words "must mean something" as a learned Judge remarked of another statutory provision and, therefore, it would seem that it is open to the Court to hold that any provision of this Part of the Act could only be employed for the purposes enumerated in section 9. What will be more interesting is to know on whom the burden of proof would rest to show that this is so.

Both "good estate management" and "good husbandry" are defined. By section 10 "good estate management" is management "such as to be reasonably adequate, having regard to the character and situation of the land and other relevant circumstances, to enable an occupier of the land reasonably skilled in husbandry to maintain efficient production as respects both the kind of produce and the quality

and quantity thereof ". Regard must also be had (section 10 (2)) " to the extent to which the owner is providing, improving, maintaining and repairing fixed equipment on the land in so far as is necessary to enable an occupier of the land reasonably skilled in husbandry to maintain efficient production as aforesaid ". " Fixed equipment includes any building or structure affixed to land and any works on, in, over or under land and also includes anything grown on land for a purpose other than use after severance from the land, consumption of the thing grown or of produce thereof or amenity, and references to fixed equipment on land shall be construed accordingly ": section 109 (3).

" Good husbandry " is the duty of the occupier " having regard to the character and situation " of the land, " the standard of management by the owner and *other* relevant circumstances ", to maintain " a reasonable standard of efficient production, as respects both the kind of produce and the quality and quantity thereof while keeping the " land " in a condition to enable such a standard to be maintained in future ": section 11 (1). The occupier is not liable for failing to maintain or repair where the obligation falls on the owner: section 11 (3). The generality of the provisions of section 11 (1) are not prejudiced by a series of more specific directions contained in section 11 (2). These in themselves are fairly exhaustive: they refer to the maintenance of pasture, the cropping, cultivation, fertilisation and condition of arable land stocking, and maintenance of stock, steps for protection against disease and pest infestation of crops and livestock, preservation of harvested crops, and maintenance and repair.

The common law liability of a tenant farmer is to cultivate " in a husbandlike manner according to the custom of the country ": *Wedd* v. *Porter*, [1916] 2 K. B. 91. This new provision imposes a very much more uncertain liability. We happened to be mentioning in the course of discussion a world-famous research station and farm, when a countryman observed: " They don't have to make it pay! " The custom of the country may be known without too much difficulty, but when there are these different views, how is it to be decided if the arable is being cropped in a manner such as to maintain it clean and in a good state of cultivation and fertility and in good condition?

In the long run this determination will probably be made by an Agricultural Land Tribunal established for the area by the Minister under section 73. An Agricultural Tribunal shall consist of a chairman appointed by the Lord Chancellor, who shall be a barrister or solicitor of not less than seven years standing and hold office for three years at a time and two other members appointed from a panel of persons nominated as to one by persons representing the interests of farmers and as to the other by persons representing the interests of landowners, but they may be assisted by two assessors from a panel nominated by the President of the Surveyors' Institute: Schedule 9. These tribunals may prove a check on any powers conferred upon the Administration, but there does not appear to be any provision for appeal from them to the ordinary Courts nor do they cover some of the most extensive powers.

The method by which these purposes envisaged in Part II are to be ensured is by Supervision Orders, Directions, and Dispossession

Orders. The last may lead to compulsory acquisition by purchase or hiring, but the rules governing this do not fall under Part II save indirectly.

Supervision Orders

A Supervision Order is made by the Minister against the owner in respect of the management of the land or against the occupier in respect of good husbandry, or against an owner-occupier in respect of either or both : section 12 (1). The Order will be made where the Minister "is satisfied" that the person concerned "is not fulfilling his responsibilities" to manage according to the rules of good estate management or to farm according to the rules of good husbandry as the case may be. The effect of the Order is to enable any person authorised by the Minister to enter on the land and inspect the management or farming and also to enable the Minister to exercise his powers of direction or dispossession : section 12 (1). The Order can only be made after giving notice to the person affected and the owner or occupier, who is not directly affected; *e.g.*, if it is a Supervision Order for good husbandry, then the owner. These persons are entitled to be heard by the Minister in opposition to the proposed order.

What is not equally clear from the Act is *how* the Minister is to be satisfied. It is presumably for this purpose among others that County Agricultural Executive Committees are kept alive : section 71; and are to have such of the powers of the Minister as he shall delegate to them : section 72. None the less, all this still leaves the fundamental question how the Minister is to be satisfied of what the "responsibilities" consist and in what manner they have been neglected. It is thought that this matter will probably come before the Courts in time and until then speculation is not very profitable, but we suspect that the argument may turn on the words of Lord Atkin in *Liversidge* v. *Anderson*, [1942] A. C. 206 at p. 233, where he said of similar words in respect of publication of newspaper articles, etc. : "In all these cases it is plain that unlimited discretion is given to the Secretary of State, assuming, as everyone does, that he acts in good faith". Assuming the Minister has this unlimited discretion then clearly the principle of *Franklin* v. *Minister of Town and Country Planning*, [1947] 2 All E. R. 289, will apply. In fact the Minister can satisfy himself pretty well how he pleases so long as he gives the owner and occupier an opportunity of stating their grounds of opposition and the Minister then considers them—or, perhaps, we should say that there is no evidence that he does not consider them.

When a Supervision Order has been made, it shall be reviewed not less frequently than once a year : section 12 (2); and the purpose of this is to enable the Minister to revoke it without prejudice to any direction already given : section 12 (3).

A Supervision Order is to be registered as a local land charge under rules to be made under the Land Charges Act and it is the duty of the Minister "forthwith" to notify the proper officer : section 12 (6). While a Supervision Order is in force any disposition, other than a testamentary disposition, does not affect its binding character on the land, unless it is made with the approval of the Minister given either before or after the disposition : section 13. Although the Order must be registered under the Land Charges Act it is thought that failure

to do so will not affect its binding character under these two sections. It is clearly a case for preliminary inquiry, but it is by no means clear how a purchaser is to be protected if the Minister by some oversight or delay fails to register the Order. An even more difficult question may arise if the Order is made between contract and conveyance. The primary reason for the Supervision Order is to bring into play the further provisions of the Act conferring powers of direction and dispossession. These cannot be exercised unless a Supervision Order is in existence, *except* (section 14 (3)) that a direction for the provision, improvement, maintenance or repair of fixed equipment can be given without such an order, and certain powers of direction concerning good husbandry can be given to maintain the national food supply: section 95 (2) (c). The power to give directions is expressed in the widest terms, that is, such as may secure that the owner or occupier shall fulfil his responsibilities for good estate management or good husbandry as the case may be: section 14 (1). Nevertheless, it is specifically provided by section 14 (2) that a direction may impose requirements, restrictions or prohibitions as to the carrying out of work. Furthermore, the direction may require that the management in the case of an owner shall be entrusted to a person appointed by the owner but approved by the Minister, *or* in the case of an occupier may direct the purpose for which and the manner in which the land is to be used for agricultural production. A direction may not be given, however, to a tenant of a holding under the Agricultural Holdings Act, 1923, and this Act to carry out on the holding any improvement within Part I of Schedule III of the Agricultural Holdings Act, 1923, without the consent of the landlord or where in accordance with that Act and this Act relating to market gardens the improvement does not require the consent of the landlord.

The sanctions for failure to comply with a direction are threefold. First, there is a penalty of a fine not exceeding £100: section 14 (4). Secondly, the Minister may authorise a person to enter on the land and carry out the work, recovering the reasonable cost from the person to whom the direction was given. This appears to be a personal liability and does not operate as a charge on the land. Thirdly, it enables the Minister to proceed with compulsory acquisition in appropriate circumstances: section 16 (7).

In order to determine the liability as between occupier and owner for carrying out a direction the Minister has power to require the production of a tenancy agreement: section 15 (3). Section 15 also contains some provisions covering the right of the owner or occupier of receiving notice of the proposed direction in order that any representations may be heard, and in connection with a direction to plough up permanent pasture there is a whole Schedule (Schedule II) devoted to regulations. If the owner is directed to *provide* fixed equipment (which includes provision by the conversion of existing fixed equipment and the repair thereof) the owner may require the proposal to be submitted to an Agricultural Land Tribunal on the ground that the estimated cost plus the cost of fixed equipment within the preceding two years together exceed the annual value of the land included in that agricultural unit: section 15 (1) (2). The Minister must then act on the report of the Tribunal.

Compulsory Acquisition and Dispossession

If the Minister is satisfied that the management of land to which a Supervision Order relates does not show satisfactory improvement he may certify accordingly and may then acquire the land compulsorily: section 16 (1); provided that no certificate shall be made without an opportunity being first given to the owner to make representations and the owner may in fact require the matter to be referred to an Agricultural Land Tribunal: section 16 (4) (5). Notice of the proposal must be served on the persons mentioned in paragraph 3 of Schedule I of the Acquisition of Land Act, 1946 (see Vol. 10, p. 186). No proposal can be made for the period of twelve months from the coming into operation of a Supervision Order unless the owner has failed to comply with a direction: section 16 (7).

Where he may acquire the land subject to the Supervision Order he may also acquire any other land managed by the same person where he is satisfied that it is necessary for the purpose of securing proper management: section 16 (2). This is, of course, subject to the same rules concerning notice and reference to the Agricultural Land Tribunal.

Very similar provisions are made with regard to a Supervision Order relating to farming. There is one essential difference. If a tenant is dispossessed, then the owner may farm it himself *if* the Minister approves *or* let it to a tenant approved by the Minister: section 17 (1) (a). If the owner is occupier then he must let it to a tenant approved by the Minister: section 17 (1) (b). The tenant is allowed a period of not less than three months from the date of the order to vacate the premises. This appears also to be the case with the owner-occupier, but the wording is not free from ambiguity. Possession can be recovered by the Minister on application to a Court of summary jurisdiction: section 17 (7).

In the case of owner-occupiers of agricultural land it will be observed that the nature of the Supervision Order may materially affect their position. If there is good estate management but unsatisfactory farming there is no power of compulsory purchase.

Where the Minister has dispossessed an occupier or owner-occupier and at the date at which he is ordered to go out of possession no tenant approved by the Minister (or owner if approved by the Minister) has taken over, then the Minister himself can go into possession: section 18. The position, then, is that the farm may be worked by a person acting under the direction of the Minister or by a person entrusted with farming it on conditions appropriate to a letting from year to year: section 18 (2). In effect the Minister appears to become a tenant from year to year, except that he will get no compensation for disturbance if and when he goes out of possession: section 18 (6). The terms of the tenancy, if it may so be called, in the last resort would be determined by arbitration under the Agricultural Holdings Act, 1923: section 18 (8). It is thought that this section really contemplates that the Minister will find a tenant because it reads (section 18 (5)) that the Minister will retain possession until—(a) " when it is being farmed by a person to whom the Minister has entrusted the farming thereof, until that person is entitled to

possession of the land as tenant thereof under an agreement with the landlord *approved* by the Minister ". Where the farming is carried on by a person acting under the direction of the Minister notice can be given to determine the possession on certain days in the year provided other arrangements satisfactory to the Minister have been made.

Finally, in this connection we should mention that there is power for an owner or an occupier to apply for dispossession of the other if that other is subject to a Supervision Order : section 19. This application may be made on any review of the Supervision Order, but the Minister can only grant the application if satisfied that no satisfactory improvement has been made during the continuance of the order and need not do so even then. At the same time it means that a tenant can apply to the Minister compulsorily to acquire his landlord's land.

In this summary survey of the provisions of Part II we have not, of course, dealt with a number of relevant details. We have tried to offer a connected picture of the main purport of the new law. In particular no attempt has been made to deal with the complications that must arise concerning " owner " and " occupier ". We may just notice here that in the case of settled land a notice of proposal of dispossession on the ground of bad management must be served also on the trustees for the purposes of the Settled Land Act and the person next beneficially entitled under the settlement : section 16 (6) (a) : and a register of trustees, etc., shall be kept by the Minister : section 21 (4). Again we have not dealt with the problem of the " agricultural unit ". The Act contemplates dealing with working units of agricultural land as a whole and naturally this leads to definition also. But these matters do not affect the main principle which first must be grasped.

Control for Efficient Production

Part II confers very wide powers of interference once a Supervision Order is made. So far as " fixed equipment " is concerned, it is not even necessary to have a Supervision Order, and probably quarrels about fixed equipment are as likely as any. Nevertheless, speaking generally, Part II depends upon a Supervision Order, but the power to give directions to an occupier concerning " good husbandry " have a more general application : section 95 (2) (c). Part V of the Act does not follow this principle. It is in a sense much more general. The purposes of this Part are concerned with the general control of efficient production.

Under section 77 the Minister shall establish an Agricultural Statistics Advisory Committee which shall include persons representing owners, farmers and persons employed in agriculture. Under section 78 he may make regulations for compiling statistics of the most searching character including situation, area and date of acquisition, names of owners and occupiers and what rent is paid, character and use of the land, and produce at a given time, fixed and other equipment, livestock and stocks of agricultural produce, methods and operations used on the land, the marketing and other disposal of produce and the number and description of persons employed and the remuneration hours of work of such persons. Furthermore, the Minister may by

regulation require that parties to any sale or to any grant, assignment or surrender of any tenancy for an interest not less than that of a tenant for a year shall supply the names and addresses of the parties and the situation and extent of the land within the prescribed period from the completion of the transaction: section 79. It can be seen that if these provisions are enforced with regard to agricultural land generally a more complete survey of agricultural land will be possible than perhaps even the *Domesday Survey* provided.

The Minister may then proceed to control much of the operation of agriculture. Not only may he acquire any agricultural land by agreement (section 82), but he may compulsorily acquire either by way of purchase or "hiring" for a period not exceeding thirty-five years (section 94) agricultural land for research, experiment or demonstration of agricultural methods: section 83; or where he is satisfied that for full and efficient use of the land for agriculture it cannot reasonably be expected that work shall be carried out or fixed equipment provided or maintained or agricultural land has been severed from other land for other than agricultural purposes under any enactment and the Minister proposes to secure the carrying out of the works, the provision or maintenance of fixed equipment or the use of the agricultural land in conjunction with other land: section 84. But in respect of land under section 84 the Minister must refer the matter to the Agricultural Land Commission for report.

More drastic still is the provision that if there is a major disposition of *part* of an agricultural unit without his consent, then within three years from the date of the disposition the Minister can acquire it by compulsory purchase together with the part not so disposed of provided that he is of opinion that this is necessary to avoid a less efficient use for agriculture: section 86. The Minister may not refuse his consent to such a disposition except on the same ground: section 86 (4). Any person affected by notice of the proposal can require it to be referred to an Agricultural Land Tribunal, which presumably will in time lay down the meaning of the words "less efficient use for agriculture". In practice, however, this section will mean that any "major disposition" of part of an agricultural unit will require the consent of the Minister if and so soon as any order is made by the Minister bringing this section into operation either generally or in relation to a particular area: section 86 (7). A "major disposition" means a conveyance of the fee simple or the grant, assignment or surrender of a tenancy for an interest greater than a tenancy from year to year except when it is made in pursuance of a specific devise, bequest or direction in that behalf contained in any testamentary instrument or where it is made in pursuance of a contract in writing entered into when the section is not in force: section 86 (3). Apparently an assent made in respect of a residuary gift is not covered by the exception. Assuming this to be the case, agricultural land should always be dealt with specifically by will unless the whole unit passes and some nice questions of what constitutes a specific devise may arise. It is, of course, arguable that such an assent is not a disposition, but it seems difficult to maintain. The creation of a mortgage or charge is not a major disposition, but the exercise of any right to take possession or to foreclose or in exercise of the powers of sale, etc., would be:

Schedule XI. We would point out again that these provisions only relate to a disposition of part of an agricultural unit.

The opposite side of the picture is the power of the Minister to call upon the Agricultural Land Commission to decide and if they think fit to formulate a scheme for adjusting boundaries between agricultural units : section 87. If necessary the scheme, if made, can also be enforced by compulsory purchase.

The most general of all the provisions are contained in section 95, where powers are conferred on the Minister when it appears to him to be necessary " in the interest of the national supply of food or other agricultural products ". He must make an order (approved by Parliament) for a period of one year, or in the case of an order made before January 1, 1950, for the period ending with December 31, 1950 (section 95 (1)), but this order may be extended for a further year by a further order if made one month before the date on which the first order expires : section 95 (8). Under this order the Minister may give directions to the occupier of any agricultural land : (i) concerning the use of the land and the manner in which and the produce for which it is to be used; (ii) carrying out any work necessary for such use; (iii) concerning any matters which fall within his powers if a Supervision Order had been made against an occupier of agricultural land, that is, in fulfilling his responsibilities for good husbandry; (iv) without prejudice to the above, concerning the maximum area to be maintained under pasture laid down with clover, grass, lucerne, sainfoin or other seeds or under herbage crops grown for commercial seed production : section 95 (2). Failure to comply with the direction will not only render the occupier liable to fine and imprisonment but also enable the Minister to enter and carry out the work and recover the expense from the occupier : section 95 (3) (4). It is, however, provided that nothing done or omitted in pursuance of a direction shall be treated as a failure to fulfil the occupier's responsibilities to farm land in accordance with the rules of good husbandry so long as it was reasonably necessary in consequence of the direction : section 95 (6). We can only surmise that this last provision indicates some uncertainty concerning the wisdom or comprehensibility of some of the directions that may be given.

Apart from the control of Parliament, which has so far not been notoriously successful where statutory orders are concerned, these powers are exercisable in the sole discretion of the Minister. As long as it " appears to the Minister necessary " he can effectively determine the use of all agricultural land. While the powers are expressed in temporary terms it does not seem that substantially this can make much difference. As a supplementary provision the Minister also has powers to prevent damage to " crops, pasture, animal or human foodstuffs, livestock, trees, hedges, banks or any works on land " by serving notice on any person who may have the right to do so—(i) to kill, take or destroy any specified animals, birds or birds' eggs, and (ii) to take the steps specified to prevent the escape of animals from specified land : sections 98 and 99. The animals and birds within section 98 are rabbits, hares and other rodents, deer, foxes and moles and wild birds other than those protected by the Wild Birds Protection Act, 1880, s. 98 (4). A person may be directed to make the destruction

notwithstanding that he would otherwise be prohibited by the Ground Game Act, 1831. Furthermore, the Minister can order the disposal of such birds, animals and eggs in whatever manner seems expedient: section 100 (3).

Failure to comply with directions entails the possibility of a fine and the right of any person authorised by the Minister to enter on the land and take the necessary steps: section 100 (1) (2). There are a number of ancillary provisions which would require consideration if in fact a direction was given. The Minister also has power to extend the range of injurious weeds requiring destruction under the Schedule to the Corn Production (Repeal) Act, 1921.

These general powers differ in one respect from those under Part II. They do not appear ever to be subject to any appeal even to an Agricultural Land Tribunal. No doubt this is largely because they cannot operate by way of dispossession at the instance of the Minister.

Conclusions

This necessarily summary survey of the powers of the Minister under the Act leaves us with the impression that there is little of the way of country life that does not fall within their province. It should, however, be emphasised that they are only powers and will not necessarily be used. Furthermore, they are expressed to be used only in certain circumstances. For example, apart from land subject to a Supervision Order the Minister should give no directions about the use to which agricultural land is put unless it appears to him to be necessary to do so in the interests of the national supply of food or other agricultural products. So, if this country ceases to be dependent upon her agricultural resources the Minister's powers in this respect would cease to be applicable. Or, at least, that would be one interpretation that could be put upon the section. At the same time we cannot see that the question could ever be raised as a matter of law. It appears to be a pure question of administrative discretion in which the Courts would have no power to intervene.

Looked at from the point of view of the substantive land law the Act is devastating if and when it comes into effect in full. A fee simple has always been regarded as conferring upon the owner, at least if beneficially entitled, freedom of alienation and of use subject to the general law. Before the legislation of the past two years this traditional view ignored some of the realities of the position. There had been certain inroads upon this freedom in all sorts of ways, and in this particular connection we might point to the limitations imposed by the Agricultural Holdings Act, 1923. But the net result of the Agriculture Act, assuming all its provisions are put into force, is to reverse the whole position. The use of the land is determined by the rules of good husbandry, or what the Minister thinks are the rules of good husbandry and good estate management. Neither the owner nor occupier of the land can, for example, leave it alone and keep his interest in the land. The form of agriculture can be changed by the owner or occupier provided that the Minister does not think it necessary for the national food supply, etc., that it should not be changed or alternatively that the Minister does not think that such a change would prevent a reasonable standard of efficient production. Again,

the same form of agriculture can be retained unless the Minister finds it necessary for the national food supply that it should be changed. Sporting rights, etc., except rights of fishing which do not appear to be touched by the Act, are at the mercy of a direction to destroy game. This last point will have to be provided against in any lease or licence of sporting rights. The other possibilities are such that so far as dispositions of the freehold are concerned it is not easy to see that any express conditions can be made. Obviously prior to contract it will be necessary to inquire whether any Supervision Order, direction or other order has been made affecting the land and search must be made in the local land registry, but apart from this it is doubtful whether anything can be acquired or done except to make it clear at the date of contract what part of the land sold is agricultural land.

As we have pointed out in an earlier number the Town and Country Planning Act makes the actual character of the use of land important in every case. What remains to be decided is whether or not it is vital to declare this in the conveyance and whether a mistake in such description or failure to include it may give rise to an action on the covenants for title. Presumably the purchaser will always require the description in the contract. As the contract is normally merged in the conveyance the purchaser is going to be much hampered if it is not included in the conveyance. On the other hand the vendor is not going to be anxious to decide in uncertain cases the extent of the definition, *e.g.*, of agricultural land. We hope to return to some of these very practical problems when we know a little more about the procedure to be adopted by the departments concerned.

Assuming then that the fee simple interest in agricultural land means in terms of user the right and *duty* to use the land " for such agricultural purposes and in such manner as shall in the opinion of the Minister be reasonably efficient to produce the agricultural products which in the opinion of the Minister are necessary for the national supply of food or other agricultural products and such other purposes as the owner or occupier determine so long as they are not inconsistent with the purposes aforesaid or with any other branches of the law of the land " the right of disposition is similarly curtailed. Foremost it is virtually impossible to sell part of any agricultural unit without the consent of the Minister. Raising money by mortgage may not be quite so difficult, but in practice mortgagees are not going to lend except on the security of a total agricultural unit. We are not clear how a vendor or intending mortgagor satisfies a purchaser or intending mortgagee of part of the land owned by him that that part was farmed as an agricultural unit. This will be a necessary inquiry in every case where the purchaser is not buying all the land owned by the vendor or the mortgage relates to a part of the mortgagor's land only.

Furthermore, when all this is said the fee simple really becomes a fee conditional—subject to the right of compulsory purchase or hiring wherever circumstances prevent the occupier from fulfilling the conditions of farming laid down by the Minister.

It has always been a theory of our land law that the land was not owned but was ultimately held as tenant of the King. This was due to the fact that save in rare cases some service was due to the King in respect of all land and failure to perform that service resulted in

forfeiture to the Crown. Forfeiture was not always enforced. The decline and fall of feudal services gradually gave place to a more and more commercial attitude towards the land and of recent years the aim of most reforms in the land law has been to treat it as so much commercial property to be bought and sold. This, of course, is the motive behind the Property Legislation of 1925 and the claims for registration of title. The Agriculture Act, 1947, and in a lesser degree the Town and Country Planning Act, 1947, proceed from an entirely different angle. Here the emphasis is not on buying and selling and commercial speculation but on use and service for the community. They are not concerned with obligations to would-be purchasers but services to the general public. This is one factor that may have great effect on the new land law which will grow up and will influence the conveyancing of the future. In particular all forms of settlement will need the most careful reconsideration. It is all very well for the Courts to say that a tenant for life is not liable for permissive waste unless a duty to repair is cast upon him: *Re Cartwright*, 41 Ch. D. 532. In fairness to remaindermen provision must be made in wills and settlements to guard against infringements of the Agriculture Act or the Town and Country Planning Act. Furthermore, there will have to be provision for raising and keeping the necessary money for maintaining or improving fixed equipment stock and such-like where these things are involved. In this overlong article we can only hint these things. We hope hereafter to pursue some of them in detail and to provide some additional precedents to cover the problems. In the meantime we would suggest that no will affecting agricultural land should be drawn without considering the effect of a Supervision Order or compulsory purchase.

It has become customary for politicians and others to speak of the great social and economic revolution that is taking place in this country. The impact of these great changes have not so far been very perceptible in those branches of private law which make up the day-to-day practice of the average lawyer. In these new land law statutes it becomes apparent. It, therefore, behoves conveyancers to master these new principles and work out their implications. This will take time, but so soon as the statutes become operative their effect must never be overlooked.

HAROLD POTTER.

THE NEW AGRICULTURE ACT AND AGRICULTURAL TENANCY AGREEMENTS

By J. MUIR WATT, M.A., Barrister-at-Law

It is proposed to deal in this article with a number of important provisions in the Agriculture Act, 1947, which will concern the draftsmen of agricultural tenancy agreements. The Act, which received the Royal Assent on August 6, 1947, is a comprehensive statute which deals with many other matters besides the relationship between the

agricultural landlord and tenant. That relationship is dealt with mainly in Part III of the Act. It is regrettable that the extreme pressure on parliamentary time has prevented the preparation of a consolidation of the law of agricultural holdings, which is now to be found partly in Part III of the new Act and partly in what survives of the Agricultural Holdings Act, 1923.

Section 3 of the Agriculture Act, 1947, provides that the Act shall come into operation on such date as His Majesty may by Order in Council appoint, and that different dates may be appointed in relation to different provisions of the Act. In fact an Order in Council has been made bringing into operation certain provisions of the Act. Part III, however, has not yet been brought into operation and will not be so brought until the Committee on Agricultural Valuation, appointed in accordance with section 25 (2), has issued its first report (*a*). This is an expert committee, consisting of fourteen persons, mostly agricultural land agents and valuers, whose initial task will be to advise the Minister of Agriculture on the method of valuing the improvements specified in Part I of the Fourth Schedule to the Act and the tenant right matters specified in Part II of that Schedule. Upon receiving the first report of this committee the Minister will issue regulations under section 25 (1) prescribing the method of calculating the value to an incoming tenant of such improvements and tenant right matters—this value being the measure of compensation laid down for these items in the Act. Until these regulations are issued the new compensation code established by Part III of the Act will be incomplete and it is no doubt for this reason that it is not proposed to bring Part III into operation until then. For the present, therefore, Part III of the Act is not in force and the old provisions of the Agricultural Holdings Act, 1923, apply. To avoid the necessity of repeating this point, however, it will be assumed in what follows that the relevant Order in Council has been made and that Part III has come into operation.

Custom

It is convenient to begin by clearing up one matter which might be a source of misunderstanding. Section 27 provides that no claim to compensation shall be based on custom. Customary compensation is, therefore, abolished, but this does not mean that the usual clause in tenancy agreements excluding custom is no longer necessary. Not all customs which may affect agricultural landlords and tenants relate to compensation. Agricultural customs which do not relate to compensation are not touched by section 27. The customs of pre-entry and hold-over are cases in point. The customary right to an away-going crop may or may not be affected by section 27 according to what form it takes. In some parts of the country the away-going crop gives the outgoer an actual right to harvest the crop, together with an auxiliary right to hold-over a portion of the barn and stack-yard for this purpose; there is no question here of a right to compensation but rights of a highly inconvenient nature over the land

(*a*) H. & C. Official Report, August 4, 1947, 127: Statement by the Minister of Agriculture.

itself. On the other hand, the customary right to an away-going crop is sometimes found in a more refined form, as a right to be compensated by the incomer for the crop on the basis of the value which it will have as a mature crop at harvest, although at the date when the outgoer quits (assuming a Lady Day entry) this potential value is not yet realised. In this less primitive form it is a mere custom to demand an enlarged pecuniary compensation and as such it will be caught by the wording of section 27.

It is still, therefore, important, if it is desired to avoid such inconveniences as double occupancy, to insert a clause in the tenancy agreement wholly excluding custom. If by any chance it is desired to confer such rights as pre-entry or hold-over these should be set out in the agreement in the most precise terms and not left to the uncertainties of custom. For example, the period of the hold-over and the buildings to which it applies should be carefully defined. In the case of an away-going crop the extent of the area allowed should be clearly stated.

Validity of Agreements Relating to Compensation

Custom having been eliminated as a source of claims to compensation, such claims can be based only on agreement or statute. A new statutory right is given to compensation for tenant right matters, which covers the main items for which customs had been established, namely, growing crops and severed or harvested crops and produce, and seeds sown, cultivations, fallows and acts of husbandry performed on the holding at the expense of the tenant. These items are included in Part II of the Fourth Schedule.

It is not proposed to deal here with the details of the Third and Fourth Schedules of the Act. Something must be said, however, of the extent to which agreements relating to compensation for the items comprised in these schedules may be made. The contracting parties are not entirely free in this respect. The position is as follows :—

(1) A landlord and tenant may agree in writing for compensation to be payable in cases which are not covered by the statutory compensation. Thus they might agree that the tenant was to receive compensation for the acclimatisation value of hill sheep—a matter which is not included in Part II of the Fourth Schedule, but which might be of importance in a tenancy which comprised some hill farming land. The parties would, of course, be free to settle both the measure of compensation and the method of calculating it.

(2) In the case of the long-term improvements specified in the Third Schedule to the Act the consent of the landlord in writing is required before the tenant can claim compensation, subject to the special provision applicable to the items in Part II of that Schedule, which enables the Minister to give his approval in cases where the tenant is aggrieved by the landlord's refusal of consent or insistence upon unacceptable terms (*b*). It is open to the landlord to give his consent unconditionally or upon such terms as to compensation or otherwise as may be agreed in writing between the landlord and tenant (*c*). The parties

(*b*) Agriculture Act, 1947, s. 24 (2).
(*c*) S. 24 (1).

may substitute for the measure of compensation laid down by the Act in respect of such improvements—the increase in the value of the holding as a holding—such other measures as they think fit. They might, for instance, agree to base the amount of compensation on the " years' principle ", whereby a fixed proportion of the original cost of the improvement is deducted annually until the benefit of the improvement is exhausted. It is submitted that the decision in *Mears* v. *Callender* (*d*) will apply to the wording of section 24 (1) of the new Act, so that the landlord cannot impose as a condition of his consent that no compensation shall be paid; even if the tenant agrees, such an agreement would be bad. The Court will not, however, inquire into the adequacy of the consideration.

(3) The position is different in the case of the medium-term improvements specified in Part I of the Fourth Schedule. Section 33 (1) provides that agreements to vary the compensation laid down by statute will be invalid save in so far as they are expressly allowed. In the case of the improvements in Part I of the Fourth Schedule there is no such express power. The measure of compensation will accordingly be that prescribed by the Act and no other, namely, the value to an incoming tenant. It is, however, provided by section 25 (4) that where the landlord and the tenant of a holding have entered into an agreement in writing whereby any benefit is given or allowed to the tenant in consideration of his carrying out an improvement specified in Part I of the Fourth Schedule the benefit shall be taken into account in assessing compensation for the improvement. It is clear that a mere covenant by the tenant in the tenancy agreement to carry out the improvement, although presumably this would be reflected in the rent payable, would not be sufficient to enable the landlord to say that a benefit in the shape of a reduction in rent had been allowed to the tenant (*e*). A tenant is entitled to compensation for improvements which he is required by the contract of tenancy to carry out. If in fact some benefit is agreed on between the parties at the time the tenancy agreement is made this should be specifically recorded and expressly stated to be in consideration of the tenant carrying out the improvement.

(4) In the case of the tenant right matters specified in Part II of the Fourth Schedule there is nothing to prevent the parties from substituting such measure of compensation, to be calculated according to such method, as they like to specify in a written contract of tenancy, in place of the measure of compensation laid down in the Act and the method of calculation which the Minister will prescribe when he issues the regulations on this subject (*f*). The measure of compensation laid down in the Act is the value to an incoming tenant (*g*). The method of calculation will be prescribed by the Minister when he receives the report of the expert Committee on Valuation mentioned above. Suppose that the Committee recommend, and the Minister prescribes, that the value to an incoming tenant should be calculated on a " seed and labour " basis. It is possible, though hardly desirable,

(*d*) [1901] 2 Ch. 388.
(*e*) S. 22 (1), proviso.
(*f*) S. 25 (3).
(*g*) S. 25 (1).

that the parties might wish to substitute for this the more burdensome "cost of production basis". It is open to them to do so, and the draftsman should seek clear instructions in regard to the parties' intentions both as to the measure of compensation and the method of calculation. The parties would, however, be well advised not to depart lightly from the obviously rational basis of the value to the incoming tenant: nor should they lightly substitute some different method of calculation for that which will be prescribed as a result of the report of the expert Committee.

The Control of Tenancy Agreements Under the New Act

Tenancy agreements are normally made between two parties, the landlord and the tenant. So far-reaching are the controls which may now be exercised by the State, in the person of the Minister of Agriculture, over the private agreements of individuals that the State might be said to be the third party to all agricultural tenancy agreements. There are provisions in the new Act under which existing agreements may be reopened and in part re-written. In drafting new agreements these drastic provisions will have to be borne in mind. They cannot fail to influence both the form and the content of agreements. These controls will be discussed under four headings:—

(a) provisions for the variation of the rents of holdings;
(b) provisions for the variation of terms as to permanent pasture;
(c) the statutory repair and maintenance clause;
(d) provisions for securing written tenancy agreements.

(a) Provisions for the Variation of the Rents of Holdings

Under the Agricultural Holdings Act, 1923, refusal or failure to agree to a demand for arbitration as to the rent by either party carried with it certain consequences as to compensation for disturbance (*h*). Under the present Act either party may demand arbitration as to the rent and this demand will be effective (*i*). There is no question of the other party being able to defeat the demand by a refusal or failure to agree. Further, the landlord is given an absolute right to increase the rent if he carries out certain improvements (*k*): in these cases he has no need to resort to arbitration, although any dispute which arises in regard to the exercise of this right will be determined by arbitration (*l*). The draftsman will bear in mind, when settling an agricultural tenancy agreement in future, that the rent fixed by the parties will be open to challenge by either of them at any time after three years from the commencement of the tenancy (*m*). He will also bear in mind the specific directions given to an arbitrator in section 35 (2). It emerges from that sub-section that an arbitrator can take into account an increase in the rental value of the holding due to improvements executed by the tenant provided that either some equivalent allowance or benefit was made or

(*h*) 1923 Act, s. 12 (1) (e) and s. 12 (3).
(*i*) Agriculture Act, 1947, s. 35.
(*k*) S. 35 (4).
(*l*) S. 35 (6).
(*m*) S. 35 (3) (a).

given by the landlord in consideration of their execution or they were executed under an obligation imposed on the tenant by the terms of his contract of tenancy. It should, therefore, be considered whether the circumstances require that the tenancy agreement should contain a clear statement that some definite allowance or benefit has been made or given by the landlord in consideration of the tenant's undertaking to carry out a specific improvement, or whether there should be inserted a positive obligation by the tenant to carry out the improvement. If, as a result of the execution of the improvement, the rental value of the holding should increase, it will then be possible for the landlord to require a reference to arbitration as to the rent with some hope of a successful result.

The provision in the second half of section 35, which confers a right upon a landlord to raise the rent if he carries out an improvement in the circumstances mentioned therein, has no direct bearing on the framing of tenancy agreements.

(b) Provisions for the Variation of Terms as to Permanent Pasture

At the present day permanent pasture is looked upon with considerable suspicion. The enthusiastic advocates of ley farming are in the ascendant and the policy of "taking the plough round the farm" enjoys official favour. It has therefore been considered that there should be some provision for the variation of tenancy agreements, whether created before or after the commencement of Part III of the Act, which may require an unduly high proportion of land to be maintained as permanent pasture. Such agreements may be revised by the Minister, either on his own initiative or on the application of either party (*n*). In drafting a tenancy agreement, clauses requiring specified land or a specified proportion of the holding to be maintained as permanent pasture should be considered carefully and the possibility of their being compulsorily modified at some future date by the County Agricultural Executive Committee (to whom the Minister's functions will no doubt be delegated under section 72 of the Act) borne in mind.

Apropos of permanent pasture, it should be noted that it will no longer be possible to insert an effective clause in a tenancy agreement making a tenant pay a certain sum per acre by way of liquidated damages in respect of the break up of permanent pasture. It will be remembered that the proviso to section 29 of the 1923 Act preserved from the prohibition of penal rents and liquidated damages a term or condition against the breaking up of permanent pasture, the grubbing of underwoods, or the felling, cutting, lopping or injuring of trees, or regulating the burning of heather. The new Act repeals this proviso, so that the prohibition is now absolute (*o*). A landlord will only be able to claim for the damage actually suffered by him and any provision in a tenancy agreement for the payment of a sum in excess of this amount upon breach of a term in the agreement will be invalid.

(*n*) S. 36 (1).
(*o*) Seventh Schedule, para. 7.

(c) The Statutory Repair and Maintenance Clause

The very important provisions of section 37 must be closely studied. This section empowers the Minister, after consultation with such bodies of persons as appear to him to represent the interests of landlords and tenants of holdings, to make regulations prescribing terms as to the maintenance, repair and insurance of fixed equipment (*p*), which are to be deemed to be incorporated in every contract of tenancy of a holding, whether made before or after the commencement of Part III of the Act, except in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other (*q*). In other words, the Minister is given power to prescribe a statutory clause relating to the maintenance, repair and insurance of fixed equipment which will be read into all contracts of tenancy, existing and future, unless to do so would result in transferring from one party to the other a liability under a *written* agreement.

As has already been mentioned, it is not intended to bring Part III of the Act into operation until the Minister has issued his regulations relating to the method of calculating the value to an incoming tenant, which is the measure of compensation for improvements comprised in Part I of the Fourth Schedule and for the tenant right matters specified in Part II of that Schedule. It is hoped that he will at the same time issue regulations under section 37 prescribing the statutory fixed equipment clause. This clause will be awaited with considerable interest.

It has been mentioned above that the statutory clause will not be incorporated if the effect of its incorporation would be to transfer a liability which has been embodied in a written agreement from one party to the other. It would seem, therefore, that the statutory clause will be effective in three cases: (1) When there is no written agreement; (2) when there is a written agreement but it is silent upon this point; (3) when there is a written agreement which imposes the liability on the same party as the statutory clause but with some difference of scope or content.

When the statutory clause is published it will probably be found that it meets the wishes and requirements of the parties in a great many cases. When this is so the tenancy agreement need not (unless the regulations require it) refer to the matter at all, although a formal reference to the fact that the clause is incorporated may be useful in drawing the attention of the parties to such fact and to their obligations under the clause.

If the written tenancy agreement imposes on one of the parties a liability which the statutory clause imposes on the other the effect is that the statutory clause is excluded (*r*). Thus, if the statutory clause places the liability on the landlord, an express clause in the written agreement placing the liability on the tenant will result in the statutory clause being rendered inapplicable. This, however, is by no means the end of the matter. If the agreement departs substantially

(*p*) See definition, *post*, p. 28.
(*q*) S. 37 (1).
(*r*) S. 37 (1).

from the statutory clause either party may compel the other to appear before an arbitrator to justify the departure (*s*). This can be done whether the tenancy agreement was made before or after the commencement of Part III of the Act. This is a very drastic provision. In determining the matter the arbitrator is to have regard "to the circumstances of the holding and of the landlord and the tenant" (*t*). If the arbitrator determines that the departure is not justifiable he may vary the terms referred to arbitration in such manner as appears to him reasonable and just between the landlord and the tenant.

Where future tenancy agreements are made which depart substantially from the terms of the statutory clause it will be as well for the parties' advisers to be satisfied that the circumstances justify the departure. Otherwise the agreement is in danger of being reopened by a dissatisfied party—an unstable position which introduces an unfortunate element of uncertainty into a sphere in which certainty should prevail.

(d) Provisions for Securing Written Tenancy Agreements

Section 38 provides that where there is not in force in respect of any tenancy of a holding an agreement in writing embodying the terms of the tenancy, or there is such an agreement in force which makes no provision for one or more of the matters specified in the Sixth Schedule to the Act, either party may compel the reference of the terms of the tenancy to arbitration under the Act of 1923. The section goes considerably further than the mere setting up of machinery for reducing verbal terms into writing. The arbitrator is directed to specify by his award the existing terms of the tenancy, subject to any agreed variations (*u*). But if those terms as so varied do not provide for all the matters specified in the Sixth Schedule then it is the duty of the arbitrator, in default of agreement between the parties, to embody in his award such provisions relating to the said matters "as appear to the arbitrator to be reasonable and just between the landlord and the tenant" (*x*). The arbitrator is, therefore, directed to fill in the gap in the contract by writing into it his conception of what is reasonable and just in regard to the matters set out in the Sixth Schedule.

In view of its importance for the drafting of tenancy agreements, the Sixth Schedule is reproduced in full below:—

Sixth Schedule

Matters for which provision to be made in written tenancy agreements

1. The names of the parties.
2. Particulars of the holding with sufficient description, by reference to a map or plan, of the fields and other parcels of land comprised therein to identify the extent of the holding.
3. The term or terms for which the holding or different parts thereof is or are agreed to be let.

(*s*) S. 37 (2).
(*t*) S. 37 (3).
(*u*) S. 38 (2).
(*x*) S. 38 (2).

4. The rent reserved and the dates on which it is payable.
5. The incidence of the liability for land tax and rates (including drainage rates).
6. In respect of all work of maintenance and repair of fixed equipment comprised in the holding, a covenant by one or other of the parties to carry out the work.
7. A covenant by the landlord in the event of damage by fire to any building comprised in the holding to reinstate or replace the building if its reinstatement or replacement is required for the fulfilment of his responsibilities to manage the holding in accordance with the rules of good estate management, and (except where the interest of the landlord is held for the purposes of a Government department or a person representing His Majesty or the Duke of Cornwall under sections forty-three to forty-five of the Act of 1923 is deemed to be the landlord, or where the landlord has made provision approved by the Minister for defraying the cost of any such reinstatement or replacement as aforesaid), a covenant by the landlord to insure all such buildings against damage by fire.
8. A covenant by the tenant in the event of the destruction by fire of harvested crops grown on the holding for consumption thereon, to return to the holding the full equivalent manurial value of the crops destroyed, in so far as the return thereof is required for the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, and (except where the interest of the tenant is held for the purposes of a Government department or where the tenant has made provision approved by the Minister in lieu of such insurance) a covenant by the tenant to insure all dead stock on the holding, and all such harvested crops as aforesaid, against damage by fire.
9. A power for the landlord to re-enter on the holding in the event of the tenant not performing his obligations under the agreement.

It will be seen that the Sixth Schedule is not a collection of model clauses, but rather a number of heads of clauses the details of which require to be filled in. Paragraph 6 will have to be considered by draftsmen in conjunction with the statutory clause relating to the repair, maintenance and insurance of fixed equipment which the Minister is to prescribe by regulations.

If it were not for the provision which is about to be explained there is one instance in which the object of section 38, the reduction of the terms of tenancy agreements to a written form, would be in a measure frustrated by the effect of the preceding section. As a result of section 37 the statutory clause relating to the maintenance, repair and insurance of fixed equipment is to be read into all tenancy agreements except in so far as to do so would impose on one of the parties to an agreement *in writing* a liability which under the agreement is imposed on the other. It is clear from this that the statutory clause would be incorporated in a case where a *verbal* agreement imposed a liability for repair which was inconsistent with the statutory liability. The

verbal agreement might, for good reasons, place the liability on the tenant, but if the statutory clause were to impose it on the landlord the statutory clause would take effect so as to nullify the verbal agreement. In the absence of some special machinery to prevent this result the arbitrator, when he came to specify the existing terms of the tenancy under section 38 (2), would have to specify the liability imposed by the statutory clause upon the landlord and not the verbal agreement which imposed it on the tenant. This would rather defeat the intention of section 38, which is presumably to reduce the parties' verbal agreements to written form. Section 38 (3), however, provides the special machinery which helps to mitigate this somewhat harsh result. That sub-section, the meaning of which is not entirely self-evident, runs as follows :—

> "Where regulations under the last foregoing section have varied the terms of a tenancy of a holding as to maintenance, repair or insurance of fixed equipment (whether those terms were established by agreement or by the operation of regulations under the last foregoing section), then if a reference is made under this section within the prescribed period after the coming into operation of the first mentioned regulations the arbitrator shall for the purposes of the last foregoing sub-section disregard the variation".

To take the case mentioned above, the arbitrator is directed to disregard the variation introduced by the statutory clause, which transferred the liability to the landlord, if the reference to arbitration is made within a prescribed time (to be prescribed by ministerial regulations) from the coming into operation of the statutory clause regulations. The arbitrator can thus give effect to the verbal terms which imposed the liability in question on the tenant.

Agreements to let Agricultural Land for an Interest Less Than a Tenancy from Year to Year

The device which proved successful in *Land Settlement Association, Ltd.* v. *Carr* (*y*) for excluding the Agricultural Holdings Act, 1923, is prevented by section 40 of the new Act. In that case an agreement provided for the letting of agricultural land for a period of 364 days, and thereafter for a further period of 364 days and thereafter for successive periods of 364 days subject to determination at any time by three months' notice in writing. It was held that this was not a letting for a term of years or from year to year within the meaning of section 57 (1) of the 1923 Act and that therefore the Act did not apply. The three months' notice was accordingly valid. Under the provision of section 40 of the new Act such arrangements as the above will take effect as agreements for the letting of the land for a tenancy from year to year, unless the prior approval of the Minister is secured.

Agreements which are found in different parts of the county for the letting of land for grazing or mowing during some specified period of the year are excepted from the provisions of section 40.

(*y*) [1944] K. B. 657.

Provisions in Agreements for Resumption of Occupation by the Landlord

Section 12 (7) (g) of the Agricultural Holdings Act, 1923, provided that compensation for disturbance should not be payable in the case where a written contract of tenancy had been entered into for the letting by the landlord to the tenant of a holding, which at the time of the creation of the tenancy had been for a period of not less than twelve months in the occupation of the landlord, upon the express terms that if the landlord desired to resume that occupation before the expiration of a specified term, not exceeding seven years, he should be entitled to give notice to quit without becoming liable to pay to the tenant any compensation for disturbance, and the landlord desired to resume occupation within the specified period and gave notice to quit accordingly.

The above provision is repealed by the new Act, along with the rest of section 12 (*z*), but section 30 (8) contains a saving for written contracts entered into before March 25, 1947. Section 31 (10) likewise saves such contracts from the new provisions enabling the tenant to challenge a notice to quit. The position is, therefore, that a clause of the kind mentioned in section 12 (7) (g) of the 1923 Act cannot now be inserted in tenancy agreements, but effect can still be given to it if included in an agreement in writing made before March 25, 1947.

Position of the Cropping Clause Under the New Act

Readers who are familiar with the Agricultural Holdings Act, 1923, will be well aware of the difficulties to which sections 30 and 31 of the Act have given rise. The Agriculture Act, 1947, amends section 30 to some extent and substitutes a new section for section 31 (*a*), but it cannot be said to have removed all difficulties of construction.

Section 30 of the 1923 Act is left unaltered in substance, so that it appears still to be a matter of importance to insert in tenancy agreements clauses regulating the method of cropping and the disposal of produce. Such clauses will be fully effective in the last year of the tenancy and will be operative throughout the tenancy for the purpose of compelling the tenant to make a proper manurial return in respect of produce sold off. The new Act clears up one point upon which doubt has been expressed. "Produce" in section 30 does not include manure produced on the holding. A clause in the tenancy agreement prohibiting the selling-off of manure will, therefore, be fully effective throughout the tenancy.

It is regrettable that the new section 31 should use the expression "subject to any agreement in writing to the contrary" which, apart from the addition of the words "in writing", is the same as the one in the original section which has given rise to difficulties. This expression means that the section does not apply if there is an agreement in writing expressly permitting the sale or removal of the items in question at any time; but equally the section does not apply if the agreement *prohibits* the selling off or removal—this is already provided for by section 30. The position is not clear from the section

(*z*) S. 30 (7).
(*a*) Seventh Schedule, paras. 8 and 9.

in its revised form any more than in its old form. It is a pity that the opportunity of clarification was not taken. The section has been improved on a minor point; it is now clear that "roots" means the produce of a root crop grown for consumption on the holding, not a "cash" crop such as sugar beet.

It may be questioned whether the slight amendments to these sections of the 1923 Act have really brought them into line with the more modern ideas embodied in the new Act. However, it appears to be still advisable that the cropping clause should lay down the rotation of crops and should be followed by a clause prohibiting the disposal of hay, straw and crops (other than the cash crops which it is intended should be sold) and manure, and providing for the consumption of the crops and the proper spreading of the manure on the holding.

Purpose for which the Landlord's Interest is Held—Special Clause Required by Section 31 (3) (c) of the Agriculture Act, 1947

Section 31 of the new Act, which enables a tenant to challenge the notice to quit given him by his landlord and compel the reference of the matter to the Minister, is one of the most important sections of the Act. It gives the tenant farmer a very high degree—in the opinion of some too high a degree—of security of tenure. It is not relevant for the present purpose to analyse the section in detail. Suffice it to say that if the Minister is satisfied that certain grounds exist he has a discretion to grant his consent to the landlord's notice to quit. One of these grounds, specified in paragraph (c) of sub-section (3) of the section is as follows:—

> "Where the tenancy was created after the passing of this Act, that the landlord proposes to terminate the tenancy for a purpose, specified in the contract of tenancy, for which the interest of the landlord was held immediately before the creation of the tenancy, and that greater hardship would be caused by the Minister's withholding than by his granting his consent to the operation of the notice".

This may be made clearer by taking an example. A father is anxious to provide for his son and intends to hand over to him the ownership of a farm, Blackacre. Unfortunately, before he is able to do this the son has to enter one of the services. He may be away for a year or two. The father decides to let Blackacre temporarily until his son returns to take over. If he specifies his purpose in the contract of tenancy and when the time comes serves a notice to quit on the tenant so as to give effect to this purpose, the Minister may, if satisfied that greater hardship would be caused by withholding than by granting consent to the notice, grant his consent. A tenancy agreement entered into in these circumstances should recite clearly and fully the landlord's purpose so that there will be no doubt about it when he later applies to the Minister for consent to his notice to quit.

The legal advisers of owners will have to consider whether their instructions require a clause to be inserted to take advantage of section 31 (3) (c): if their instructions are not clear on this point they should seek confirmation. Once Part III of the Act is in

operation it is not going to be an easy matter to get rid of a tenant who farms the land with average or near-average ability. If, therefore, the circumstances justify it, care should be taken in framing a clause which will attract section 31 (3) (c); the omission of such an express clause will be fatal to the landlord's chances of obtaining the Minister's consent to his notice to quit under this provision.

The Relation Between Part II and Part III of the Act

Part II of the Act deals with good estate management and good husbandry. The disciplinary measures contained in this Part, although they affect the drafting of tenancy agreements less directly than the provisions of Part III, nevertheless constitute a new background against which the provisions of tenancy agreements have to be studied. Part II contains powers to guide, direct and finally to remove the unsatisfactory owner or occupier. A standard of good husbandry is laid down for the occupier and a standard of good estate management for the owner (*b*). Failure to attain that standard may lead to supervision, direction and finally dispossession. Such failure is, therefore, considered to be a matter for the intervention of the State, and not a matter to be left merely to be dealt with by such remedies as are open to the parties under their private agreements. The provisions of these agreements may, however, have some bearing on what are the obligations of the parties under the rules of good estate management or good husbandry. Thus section 10 (3) of the Act lays it down that:

> "The responsibilities under the rules of good estate management of an owner of land in the occupation of another person shall not in relation to the maintenance and repair of fixed equipment include an obligation to do anything which that other person is under an obligation to do by virtue of any agreement".

In so far as the tenant has undertaken the maintenance and repair of fixed equipment under the contract of tenancy, this ceases to be an obligation of the landlord under the rules of good estate management. It will be observed that it is only in so far as the tenant has *expressly assumed* this obligation that it is excluded from the landlord's obligations under these rules. If, therefore, the agreement is silent on this point, the obligation will still remain the landlord's under the rules of good estate management, even although he is not under any contractual obligation. This explains the wording of section 11 (3) which contains no reference to an agreement but which provides as follows:

> "The responsibilities under the rules of good husbandry of an occupier of an agricultural unit which is not owned by him shall not include an obligation to carry out any work of maintenance or repair which the owner of the unit or any part thereof is under an obligation to carry out in order to fulfil his responsibilities to manage in accordance with the rules of good estate management".

It may be noted here that the landlord has a statutory right under section 29 (1) to claim compensation for damage caused by non-fulfilment by the tenant of his responsibilities to farm in accordance

(*b*) Ss. 10 and 11.

with the rules of good husbandry. The landlord can rely on this statutory right instead of claiming under a term of the contract of tenancy. The rules of good husbandry are so drafted as to afford a landlord fairly adequate protection.

DEFINITION OF FIXED EQUIPMENT

As a footnote to this article, the attention of the reader is called to the somewhat extended definition of fixed equipment in section 109 (3) of the Act :—

> " ' Fixed equipment ' includes any building or structure affixed to land and any works on, in, over or under land, and also includes anything grown on land for a purpose other than use after severance from land, consumption of the thing grown, or of produce thereof, or amenity and reference to fixed equipment on land shall be construed accordingly ".

Applying the ordinary canon of construction, the use of the word " includes " instead of " means " indicates that fixed equipment has its ordinary natural meaning and in addition comprises these other items specifically mentioned (*c*). It has, therefore, obviously a wide connotation and appears to include *inter alia* land drainage works, ditches and hedges.

SECRET TRUSTS

By J. G. FLEMING, M.A., Barrister-at-Law

The attitude of Courts of Equity towards the testamentary provisions of the Statute of Frauds and the Wills Act, 1837, has always been a subject fraught with considerable difficulty and a fertile source of misunderstanding and confusion. In spite of the concerted attempt by the House of Lords in *Blackwell* v. *Blackwell* (*a*) to reduce this body of law to a semblance of cohesion, subsequent decisions are evidence of their failure to reconcile the conflicting tendencies inherent in two independently developed, though related, lines of authority. These are, first, the principle of " incorporation by reference " which represents a modification and extension of the statutory provisions themselves, and secondly, the doctrine of " secret trusts " which has been evolved, on the basis of professedly independent principles of general equity, altogether " outside " (*b*) the relevant statutory provisions.

In relation to the trust concept, two situations are customarily distinguished : on the one hand, those cases where the legatee or intestate successor has accepted a trust imposed upon him, though the existence of such trust is not disclosed in the testamentary instrument

(*c*) See *e.g.*, Lord Selborne's observations in *Robinson* v. *Barton Eccles Local Board* (1883), 3 App. Cas. 789, 801.

(*a*) [1929] A. C. 318.

(*b*) Cf. Lord Sumner in *Blackwell* v. *Blackwell*, [1929] A. C. at p. 335.

if any (*c*); and on the other, cases where the will itself manifests the testator's intention to create a trust, though its terms are not therein ascertained. The former are substantially devoid of serious difficulty since the existence of the trust is established strictly "dehors" the will, and consequently unaffected by the statutory requirements prescribing the formalities to which testamentary instruments must conform. The admission of evidence establishing the communication and acceptance of the trust, whether oral or in writing (*d*), cannot be construed as a presumption on the part of equity to "give the go-by" to the Wills Act (*e*). On the contrary, the explanation of the doctrine is found in the principle that the beneficial and absolute gift will pass to the legatee in accordance with the will, but equity, having permitted him to take under the testamentary instrument at law, then compels him to apply it in accordance with the trust. "In other words, it makes him do what the will in itself has nothing to do with" (*f*).

This method of reasoning, coupled with the necessity for communication and acceptance of the trust (*g*), also determines the limits beyond which the admission of extraneous evidence cannot be carried. Since equity interposes its power at the moment when the interest passing under the will has reached the hands of the legatee, an attempted communication after the testator's death is altogether nugatory, as, the will taking effect on death, the legatee's conscience was not at that crucial moment affected by the acceptance of the confidence placed in him by the deceased. It is not the unilaterally expressed intention of the testator, but the conduct of the legatee in inducing the former, on the faith of his promise, to make or revoke his will, which calls the equitable doctrine into operation (*h*). Communication and acceptance of the trust prior in time to the property devolving to the legatee at law are essential to its validity in equity. From this follows that a memorandum prepared by the testator but uncommunicated to the legatee in the former's lifetime, is inadmissible (*i*), though a bare intimation before death that he is to hold as

(*c*) The equitable doctrine is applicable to cases of intestacy as well as of testate succession. It has been invoked in the following situations:—

(1) where the testator is induced to make a will—*Strickland* v. *Aldridge* (1804), 9 Ves. 517;

(2) where he is induced to leave an existing will unrevoked—*Moss* v. *Cooper* (1861), 1 J. & H. 352;

(3) where he is induced to abstain from making a will—*Sellack* v. *Harris* (1708), 5 Vin. Ab. 521; *Re Gardner*, [1920] 2 Ch. 523;

(4) where he is induced to revoke his will—*Tharp* v. *Tharp*, [1916] 1 Ch. 142.

(*d*) But unattested. Before the Wills Act, 1837, there was no requirement for attestation of wills disposing of personalty. Since the Act, identical formalities are applicable to bequests and devises (s. 9). Decisions on the admissibility of secret trusts prior to 1837 are equally relevant since that date.

(*e*) Cf. Lord Sumner at p. 337, criticising an observation by Vaughan Williams, L.J., in *Re Pitt-Rivers*, [1902] 1 Ch. 403, 407.

(*f*) At p. 335.

(*g*) *Per* Eve, J., in *Re Gardom*, [1914] 1 Ch. 662, 671, and Lord Sumner in *Blackwell* v. *Blackwell*, [1929] A. C. 318, 334. The testator must have imposed an obligation. A mere discretion is not sufficient—*Rowbotham* v. *Dunnett* (1878), 8 Ch. D. 430.

(*h*) Equity acts in personam! This principle has also been applied in relation to s. 4, Statute of Frauds—*Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*i*) *Wallgrave* v. *Tebbs* (1855), 2 K. & J. 313 (Page Wood, V.-C.); *McCormick* v. *Grogan* (1869), L. R. 4 H. L. 82; *Re Louis* (1915), 32 T. L. R. 313.

trustee without disclosure of the terms of the trust, is sufficient to prevent the legatee from taking beneficially; he will hold the property on trust, not for the purposes set out in the memorandum, but on behalf of the residuary legatees or persons entitled on intestacy (*k*). The circumstance that the legatee is himself a member of that class does not appear to be material and to disqualify him from ultimately succeeding to the interest in equity (*l*). It has, however, been suggested, that tender of a letter to the legatee in the testator's lifetime, although accompanied by a request against opening the same until after death, amounts to a sufficient communication and acceptance of the trust, as the trustee had the means of knowledge of its terms available to him (*m*). The ambulatory operation and revocability of testamentary instruments explains the further rule that evidence is admissible to establish the existence of a trust communicated at any time before the testator's death, irrespective of whether this occurred prior to, simultaneously with, or subsequently to the execution of the will. As explained by Page Wood, V.-C., in *Moss* v. *Cooper* (*n*): "It is altogether immaterial whether the promise is made before or after the execution of the will, that being a revocable instrument". This seemingly self-evident deduction from the underlying principle of the doctrine of secret trusts as established in *Moss* v. *Cooper* (*n*), *Re Gardner* (*o*), and reiterated by the House of Lords in *Blackwell* v. *Blackwell*, might appear too cogent to warrant particular emphasis, but for the challenge of its applicability to cases where the trust appears on the face of the will itself (*p*).

Before discussing the special problems raised by those cases, it is thought convenient to draw attention to a line of decisions dealing with the relationship of valid secret trusts to the testamentary instruments with reference to which they were imposed. Although, as has been pointed out, the trust is admitted on the supposition that it arose "dehors" the will, it is nevertheless dependent and conditional on the validity of the testamentary instrument, since the equitable principle does not become operative unless and until the interest has passed under the will into the hands of the legatee on the faith of whose promise the testator made the bequest. It is a fallacy, however, to conclude from this premise that the trust is incorporated into the will: it rests on, but is not part of the testamentary instrument. This proposition is neatly illustrated by the decision of the House of Lords in *Cullen* v. *Att.-Gen. for Ireland* (*q*). The testator left an absolute legacy to a

(*k*) *Re Boyes, Boyes* v. *Carritt* (1884), 26 Ch. D. 531.

(*l*) In *Blackwell* v. *Blackwell* it was suggested by the appellants that in such a case evidence of the secret trust was admissible, but this contention was rejected by Lord Buckmaster (p. 328).

(*m*) *Per* Kay, J., in *Re Boyes* (1884), 26 Ch. D. 531, 536, and approved by the Court of Appeal in *Re Keen* (*per* Wright, M.R.), [1937] Ch. 236, 242–3, overruling Farwell, J., on this point. But cf. the apparently contrary conclusion reached in *Lomax* v. *Ripley* (1855), 3 Sm. & Giff. 48 (Stuart, V.-C.), quoted with approval by Malins, V.-C., in *Rowbotham* v. *Dunnett* (1878), 8 Ch. D. 430, 439. There a sealed envelope had been handed by the testator to his wife, but it is not clear whether she retained it after her husband had made certain alterations. It was not admitted in evidence.

(*n*) (1861), 1 J. & H. 352, 367.

(*o*) [1920] 2 Ch. 523.

(*p*) *Vide Infra.*

(*q*) (1866), L. R. 1 H. L. 190.

private person, but simultaneously with the execution of his will communicated his intention to the latter to have the legacy applied for certain charitable purposes. The issue arose whether exemption from death duty could be claimed on the ground that the legacy was " a gift, by will or testamentary instrument " " to be applied in support of any purpose . . . merely charitable ", within the meaning of certain Stamp Acts. It was held that the duty was payable, even although this might have the result of enabling a man to give a legacy to his wife with a secret trust in favour of third parties so as to evade the higher rate of death duty. Lord Westbury, after pointing out that the title of the person claiming under the secret trust is a title dehors the will, concluded with these words : " You cannot say that this is a bounty to a charity, when the charity has no place, and is not to be found either in anything that is expressed in the will, or in anything that is so referred to in the will as by that reference to be made part of the will " (*r*). The distinction between secret trusts and documents incorporated by express reference in the will has not been observed with equal precision in later decisions. In *Re Fleetwood* (*s*) one of the beneficiaries under a parol trust had been an attesting witness to the will which the testator executed simultaneously with the communication and acceptance of his secret wishes. On these facts, Hall, V.-C., came to the conclusion that the trust in her favour must fail (*ss*) as to her beneficial interest " as it would have done had the trust been declared in the (will) " (*t*). Similarly, in *Re Maddock* (*u*) the testatrix expressed her desire in a memorandum that a specified portion of the residue was to pass to a named beneficiary. This trust was accepted by the legatee. The Court of Appeal held that the payment of debts was to be borne, primarily by the remainder of the residue, and not *pari passu* with the specified portion disposed of under the trust, on the ground that " as between the devisee or legatee and the persons interested under the memorandum, all the same consequences must follow as would follow if the memorandum had in fact formed part of the will " (*v*). The reserved part of the residue under the trust was deemed a specific legacy which was not liable to the payment of debts until the residuary estate was exhausted (*w*).

These two decisions are not easily reconcilable with *Re Gardner* (*No.* 2) (*x*), where the beneficiary under the parol trust predeceased the testatrix, and Romer, J., held the former's personal representatives to be entitled to the fund thus disposed. The learned Judge, taking his stand on the proposition that trusts arise *aliunde* the will, felt no compulsion to follow the reasoning of *Re Fleetwood* (*supra*) and to hold the legacy to have lapsed. He found a sufficient explanation for the contrary conclusion reached in *Re Maddock* (*supra*) in the fact that, in that case, the testatrix had shown an inescapable intention

(*r*) At p. 199.
(*s*) (1880), 15 Ch. D. 594.
(*ss*) By virtue of s. 15, Wills Act, 1837. It is illogical in itself to admit one section (s. 15) of the Act and reject another (s. 9). The fact that the trust appeared on the face of the will does not appear to have been considered material.
(*t*) At p. 609.
(*u*) [1902] 2 Ch. 220.
(*v*) *Per* Cozens-Hardy, L.J., at p. 232.
(*w*) See now s. 34 (1) and Part I of First Schedule, A. E .A., 1925.
(*x*) [1923] 2 Ch. 230.

to incorporate the memorandum into the will (*y*), but rejected the wider statement of principle as propounded by Cozens-Hardy, L.J., in the Court of Appeal. Romer, J., further suggested the possible distinction (*z*) that a parol trust might well form part of the testamentary instrument for the purpose of ascertaining what was the property which was affected by the trust, but not for the purpose of ascertaining the persons to be benefited by it; but this explanation does not eliminate the decision in *Re Fleetwood* (*a*) and is, in truth, devoid of any substantive merit. In the light of Lord Sumner's statement of principle in *Blackwell* v. *Blackwell*, the validity of these decisions is not entirely free from doubt. *Re Fleetwood* and *Re Maddock* are inconsistent with the acknowledged principle that the admission of parol evidence is permissible only on the assumption that the trust is altogether independent of the contents of the testamentary instrument, whereas Romer, J., in *Re Gardner* (*No.* 2) evidently ignored the circumstance that the trust does not become operative at the moment of communication and acceptance of the testator's secret wishes, but only when the legatee, at the testator's death, has received the interest under the will which equity will then compel him to apply in accordance with his earlier promise. As Dr. Hanbury pertinently observes (*b*) : " the decision in *Re Gardner* suggests the possibility of a trust with delayed action, or anticipatory trust " which is a " strange novelty " unlikely, it is hoped, to commend itself in the future.

Somewhat analogous is the situation where the legatee upon whom the secret trust has been imposed himself predeceases the testator. Although the Courts have not hitherto had the opportunity of directly deciding the issue, numerous *dicta* bear evidence that this problem is not of purely theoretical importance. As Lord Sumner pointed out in *Blackwell* v. *Blackwell*, " in its application to a bequest the doctrine (of secret trusts) must in principle rest on the assumption that the will has first operated according to its terms " (*c*). Since the trust does not affect the property disposed of by the will except by reason of the personal obligation undertaken by the legatee, failure of the will, or at any rate of that part of the will with reference to which the secret trust was imposed, will dispense with the necessity of equitable interference. As the trust does not arise until the legatee has received the interest under the testamentary instrument, its enforcement is conditional on the validity of the legacy itself. Hence, " if the legatee renounces and disclaims, or dies in the lifetime of the testator, the persons claiming under the memorandum can take nothing against the heir-at-law or next-of-kin or residuary devisee or legatee " (*d*). Agreement with this conclusion is implicit in Lord

(*y*) Cf. *Re Falkiner*, [1924] Ch. 88, *infra* (*z*) [1923] 2 Ch. 230, 234.

(*a*) This decision was mentioned neither in argument nor in the judgment.

(*b*) 4th ed., p. 132, n. 50. Also strenuously criticised by C. A. Wright in 14 Can. B. R. 90.

(*c*) [1929] A. C. 318, 334.

(*d*) *Per* Cozens-Hardy, L.J., in *Re Maddock*, [1902] 2 Ch. 220, 231. This view was also taken by Crossman, J., in *Re Colin-Cooper*, [1939] Ch. 580, 585, but did not arise directly, as the testator had not cancelled the earlier will, but merely increased the amount of the legacy by subsequent codicil. Held that, as there was no communication as to the increase, the legatee was only bound by the original trust. Aff. by C. A., [1939] Ch. 811.

Sumner's judgment in *Blackwell* v. *Blackwell*, but unfortunately Lord Buckmaster in the same case appeared to register his dissent in these terms: "In the case where no trusts are mentioned the legatee might defeat the whole purpose by renouncing the legacy and the breach of trust would not in that case enure to his own benefit, but I entertain no doubt that the Court having once admitted the evidence of the trust, would interfere to prevent its defeat" (*e*). Since a distinction, for this purpose, between renunciation of the legacy and lapse by reason of the legatee's prior decease is unwarranted, this statement is in direct contradiction to the views of Cozens-Hardy, L.J., and Lord Sumner and does not invite support. The facile reference to the existence of a trust has obscured the fact that the trust is not engrafted on the will until and unless the will has taken effect at law, so that the rule that equity will not permit the failure of a trust for want of a trustee is wholly inapplicable to this situation.

These preliminary observations underline the uncertainty surrounding the relationship between the trust concept and the testamentary instrument which is apparent even in cases where the will does not, on its face, bear any reference to the existence of any dispositions created *aliunde*. These difficulties are considerably enhanced where the legacy is not absolute but discloses the existence of a trust. Although since 1688 the Courts of Chancery have permitted the admission of parol evidence to establish a trust in these circumstances (*f*), this practice did not pass unchallenged (*g*), and it was not until 1929 that the House of Lords settled previous doubts and gave approval to the principle that the considerations of general equity, discussed above, are applicable with equal force whether the legacy is *prima facie* beneficial or discloses the existence of a trust.

The following points emerge from the cardinal decision in *Blackwell* v. *Blackwell*: (1) The admission of evidence in either case is based on the principle that equity will not aid the perpetration of "fraud" (*h*). The fact that, where the trust appears on the face of the will, the legatee can in no circumstances take beneficially, is not sufficient to oust the equitable doctrine, since in both situations the testator, on the faith of the legatee's promise, has either executed or failed to revoke his will, and the real beneficiaries under the parol trust would be equally deprived of their intended benefits. The basic consideration is not so much the danger that the legatee might profit by his own "personal" fraud, as suggested by Lord Hatherley in *McCormick* v.

(*e*) [1929] A. C. 318, 328.

(*f*) *Crook* v. *Brooking* (1688), 2 Vern. 50; *Pring* v. *Pring* (1689), 2 Vern. 99; *Smith* v. *Attersoll* (1826), 1 Russ. 266; *Prodmore* v. *Gunning* (1836), 7 Sim. 644; *Riordan* v. *Banon* (1875), L. R. 10 Ir. Eq. R. 469; *Re Fleetwood* (1880), 15 Ch. D. 594; *Re Huxtable*, [1902] 2 Ch. 793 (C. A.).

(*g*) Lords Dunedin and Parker in *Le Page* v. *Gardom* (1915), 113 T. L. R. 475, 467, 477. Warrington, L.J., in *Re Gardner*, [1920] 2 Ch. 523, 532. *Lewin* (13th ed.), p. 60; *Jarman* (6th ed.), pp. 484–96; *Theobald* (8th ed.), p. 81.

(*h*) This is occasionally referred to as "equitable fraud", but this expression did not meet with Neville's, J. approval in *Re Tharp*, [1916] 1 Ch. 142, 151–2: "I do not think it is what is sometimes called equitable fraud, which is a mental disorder which I have never been able to fathom, but is in my opinion simply fraud".

Grogan (*i*), but the notion that the confidence placed in his acceptance of the obligation has changed the position of the parties, and thus removed the matter from the provisions of the Wills Act. Moreover, it is noteworthy that in a large number of cases prior to 1891 (*ii*), the legatee was attempting to invoke the protection of the Wills Act, not in order to oust the beneficiaries under the parol trust from their benefits but, quite on the contrary, to implement the testator's wishes which would, had the trust been admitted, have failed by virtue of the Mortmain Act of 1736 (*j*). (2) Considerable difficulty was experienced in reconciling the equitable doctrine with the general principle that extraneous evidence is inadmissible, if tendered with a view to contradicting or varying written instruments; cases of the *McCormick* v. *Grogan* type being distinguished on the ground that there the evidence was adduced for the purpose of adding to, not contradicting the tenor of the will (*k*). In the first place, this line of reasoning could only apply to those rare cases where the legacy is given to X "on trust" (without more), but not where the intention to benefit persons outside the will is manifest, as, *e.g.*, in *Blackwell* v. *Blackwell*, where the testator bequeathed the fund "for purposes indicated by me". More fundamentally, however, the House of Lords completely traversed this argument by the explanation that the evidence is admitted, not solely for the purpose of elucidating the terms of the will, but primarily of establishing the trust itself. Though the latter is mentioned on the face of the will, the beneficiaries take *aliunde*, and not by virtue of the will itself. In the words of Lord Warrington (*l*), "if the evidence had merely established who were the persons and what were the purposes indicated, it would . . . have been inadmissible, as to admit it would be to allow the making of a will by parol. It is the fact of the acceptance of the personal obligation which is the essential feature, and the rest of the evidence is merely for the purpose of ascertaining the nature of that obligation".

(*i*) (1869), L. R. 4 H. L. 82, 89, criticised by Hall, V.-C., in *Re Fleetwood* (1880), 15 Ch. D. 594, 607, and Lord Buckmaster in *Blackwell* v. *Blackwell*, [1929] A. C. 318, 329.

The conception of "personal fraud" may well have been the starting point of the equitable doctrine, but it has since been refined from its more primitive origin. This development is corroborated by a study of the decisions defining the element of "acceptance" by the legatee. Beginning with cases of active procurement and inducement, mere silence after the testator's communication of his wishes is now deemed sufficient to let in the doctrine. Cf. *Springett* v. *Jenings* (1870), L. R. 10 Eq. 488, Lord Hatherley in *McCormick* v. *Grogan*, L. R. 4 H. L. 82, 89; *Re Keen*, [1937] Ch. 236, 242–3. This conception has, however, left a permanent mark in the rule that in cases of joint legatees, communication to one, if subsequent to the execution of the will, does not bind the other joint tenant, as his conscience is unaffected by the fraud of the other—*Burney* v. *Macdonald* (1845), 15 Sim. 6; *Re Stead*, [1900] 1 Ch. 237. *Sed aliter*, if communication precedes the will—*Russell* v. *Jackson* (1852), 10 Hare 204, on the ground that no person may claim an interest under fraud committed by another. Contrast the position of tenants-in-common where communication to one does not deprive the others of their beneficial interests, even though it precedes the will—*Tee* v. *Ferris* (1856), 2 K. & J. 357; *Rowbotham* v. *Dunnett* (1878), 8 Ch. D. 430.

(*ii*) Mortmain and Charitable Uses Act, 1891.

(*j*) The secret trust was set up, not by the beneficiaries under the parol trust, but by the residuary devisees or heirs-at-law. *Wallgrave* v. *Tebbs* (1855), 2 K. & J. 313; *Tee* v. *Ferris* (1856), 2 K. & J. 357; *Jones* v. *Badley* (1868), L. R. 3 Eq. 362; *Springett* v. *Jenings* (1870), L. R. 10 Eq. 488.

(*k*) This argument was forcibly advanced by Lewin and Jarman (see note *g*), discussed by Lord Buckmaster, [1929] A. C. 318, 322–3. Also Prof. Wade in 45 L. Q. R. 4–5.

(*l*) [1929] A. C. 318, 342.

This statement of principle made untenable the suggestion that the admission of a parol trust was an extension and a branch of the doctrine of incorporation of documents by reference in the will. This, previously current, "heresy" was not only entertained by the advocates of the rejection of those secret trusts which are referred to on the face of the testamentary instruments, but was also occasionally voiced by the very Judges who felt themselves in agreement with the decisions in *Re Fleetwood* (*supra*) and *Re Huxtable* (*m*). Thus, Vaughan Williams, L.J., considered that "evidence (was) admissible only for the purpose of proving matters which are not defined by the will" (*n*), and Eve, J., in *Re Gardom* (*supra*) expressed his inability to "understand the grounds upon which, in cases where, on the face of the will, a trust is disclosed, communication of the trust to the trustees has been held to be an essential element of its creation. . . . The problem is to find out what is the trust, not whether there is a trust at all, and, speaking for myself, I cannot see why a communication to the trustee should be an essential element in the solution of the problem, or, indeed, of any greater value than a communication made to any other person, and of course properly proved" (*o*). The judgments in *Blackwell* v. *Blackwell*, however, have clearly established that, unlike in cases of incorporation of documents expressly referred to in the will, communication and acceptance by the legatee constitute the essential prerequisites for admission of parol evidence to establish a trust, whether the legatee is designated as trustee on the face of the testamentary instrument or not. This contrast further suggests that the limits imposed on the rules of "incorporation" are likewise inapplicable to the distinct doctrine of "secret trusts". This inevitable conclusion, however, has been ignored, and we have witnessed the spectacle of the "heresy", expelled through the front gate, stealthily re-entering by the side-door.

The lever for this regrettable development was provided by Lord Sumner in these words: "The limits, beyond which the rules as to unspecified trusts must not be carried, have often been discussed. A testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime" (*p*) Whereas the rejection of evidence in the second situation is indisputably based on the absence of a personal obligation undertaken by the legatee, the first limitation is irreconcilable with the general principle previously enunciated by the same learned Judge. The revocability of testamentary instruments and the consideration that the equitable

(*m*) (1880), 15 Ch. D. 594, [1902] 2 Ch. 793. These decisions were confirmed in *Blackwell* v. *Blackwell*.

(*n*) *Re Huxtable*, [1902] 2 Ch. 793, 795.

(*o*) [1914] 1 Ch. 662, 672–3. Eve, J., held that communication to one of several trustees is sufficient to bind all. The rule is different where an apparently absolute legacy has been left to several persons—see *Re Stead*, [1900] 1 Ch. 237. The C. A. and H. L. did not find it necessary to decide the issue, as, unlike Eve, J., they held that, upon the evidence, no trust had been established, but Phillimore, L.J. (at p. 675) was inclined to accept the argument that, where the legacy is upon trust, communication to any or either trustee is unnecessary.

(*p*) [1929] A. C. 318, 339.

doctrine is solely based on the reasoning that the legatee's conscience has been affected by his acceptance of the trust "on the faith of which the will was made *or left unrevoked*" (*q*) refute the logical, and indeed legal compellability of this proposition. As demonstrated by Sir William Holdsworth (*r*), it rests exclusively on the unsatisfactory decision in *Johnson* v. *Ball* (*s*), where evidence of a trust communicated subsequently to the execution of the will was rejected on the ground that it would facilitate the creation of post-mortem dispositions not complying with the provisions of the Wills Act. Vice-Chancellor Parker's sole reference to the authority of *Croker* v. *Marquis of Hertford* (*t*) demonstrates an insufficient attention to the distinction between the doctrine of secret trusts and the rules of incorporation by reference, since that decision merely established that a testator cannot reserve to himself, in his will, a power of making future unattested dispositions. It is a settled rule of law that he may, in his will, refer to existing *written* documents which are thus incorporated into it (*u*), but this has no relevance to the imposition of a trust *aliunde*. Nevertheless, it is difficult to dispel the impression that, whereas evidence of an *oral* trust was admitted even where the will disclosed its existence, the second limitation of the testamentary rule, restricting reference to existing documents, was thus engrafted on the law of secret trusts. In view of the doubts entertained as to the propriety of the admission of evidence to establish parol trusts where the legatee was designated as trustee on the face of the will, it is understandable that the distinction between communication prior to and subsequently to the execution of the will was not immediately challenged and received occasional approval (*v*), even after the validity of trusts imposed before the execution of the will had been repeatedly affirmed (*w*). Its retention, however, in the light of the complete reorientation effected by the decision in *Blackwell* v. *Blackwell* (*supra*) is a source of confusion, since it seriously qualifies the general principle enunciated in that case.

Lord Sumner's view was evidently not shared by Lord Warrington who was prepared to predicate validity to a "trust on the faith of which the will was made *or left unrevoked*" (*x*). Similarly, in *Re Hawkesley* (*y*), Luxmoore, J., thought that, if there had been a communication subsequently to the will whereby the testator had left

(*q*) *Per* Lord Warrington at p. 342.
(*r*) 53 L. Q. R. 501 (1937).
(*s*) (1851), 5 De G. & Sm. 85.
(*t*) (1844), 4 Moo. P. C. 339. He also cited *Briggs* v. *Penny* (1849), 3 De G. & Sm. 525, which settled the invalidity of trusts communicated after the testator's death.
(*u*) Cf. Lord Cairns in *Singleton* v. *Tomlinson* (1878), 3 A. C. 404, 414, and *In the goods of Pearse* (1867), L. R. 1 P. & M. 382.
(*v*) *E.g.*, by Hall, V.-C., in *Re Fleetwood* (1880), 15 Ch. D. 594, 608, Kay, L.J., in *Re Boyes* (1884), 2 Ch. D. 531, 535; Joyce, J., in *Re Hetley*, [1902] 2 Ch. 866, 869; Swinfen-Eady, L.J., in *Re Gardom*, [1914] 1 Ch. 662, 675; *sed contra re Falkiner*, [1924] Ch. 88, where the testatrix had directed the legatees to dispose of the property bequeathed to them in accordance with any memorandum to be left among her papers at her death. Tomlin, J., passed no suggestion that evidence of a subsequent communication would have been inadmissible. In actual fact, the communication had preceded the will. *Vide infra.*
(*w*) *Re Fleetwood* and *Re Huxtable.*
(*x*) [1929] A. C. 318, 342.
(*y*) [1934] Ch. 384.

his residue to legatees "to carry out instructions that I may leave in writing or verbally", it could have taken effect as a valid trust. In default of any communication, however, the legatee was deemed to hold as trustee for the persons entitled to the interest on intestacy (*z*). Though this decision was adduced in argument in *Re Keen* (*a*), the Court of Appeal, *per* Wright, M.R., preferred Lord Sumner's view as a statement of unquestionable authority on the ground that the admission of such evidence would validate "a reservation of a future power to change the trusts" (*b*). It is hoped that the fallacy of this comparison with an attempted "reservation of a future power to make unwitnessed *post-mortem* dispositions" (*c*) has been sufficiently stressed to escape notice. Neither in *Re Keen* (*supra*) nor in the more recent case of *Re Jones* (*d*), where Simonds, J., again approved of the authority of *Johnson* v. *Ball* (*supra*) were the Courts directly seised of this issue, so that it still rests exclusively on Vice-Chancellor Parker's early decision, and it remains open to the House of Lords, if not to the Court of Appeal, to rectify an error which constitutes a serious anomaly in the law of secret trusts.

An equally serious limitation of the general principle is illustrated by a line of decisions which have established the rule that evidence of a parol trust is inadmissible, if it is inconsistent with the terms of the will itself. Thus, in *Johnson* v. *Ball* (*e*), where the legacy was to be held "upon trusts appointed by letter and signed" by the testator, it was held that verbal communication, if otherwise admissible (*f*), must be rejected as it would contradict the wording of the will. In *Re Huxtable* (*g*) the testator directed the legacy to be applied "for the charitable purposes agreed upon between us". The legatee sought to adduce evidence of a trust communicated to him prior to the execution of the will, whereby he had undertaken to supply the income of the fund to certain charities during his lifetime, but to treat the capital as his own property after his death. The Court of Appeal decided that, since the will referred to a complete disposition of capital as well as income, evidence could only be admitted for the purpose of ascertaining the charitable purposes, as the second provision of the trust, permitting retention of capital, was inconsistent with the tenor of the will. As a result the Court, though purporting to enforce, in fact materially altered the dispositions of the trust, by admitting one and rejecting the other part of the memorandum (*h*). Similarly, in *Re Hetley* (*i*), Joyce, J., expressed the opinion that, if the will referred to past communications, a subsequent trust was inadmissible. The reasoning in these cases is clearly based on the assumption that where the trust appears on the face of the will, evidence is admissible only for the purpose of supplying the required information to supplement

(*z*) Cf. *Re Boyes* (1884), 2 Ch. D. 531.
(*a*) [1937] Ch. 236.
(*b*) At p. 247.
(*c*) As in *Croker* v. *Marquis of Hertford*, *vide supra*.
(*d*) [1942] Ch. 328.
(*e*) (1851), 5 De G. & Sm. 85.
(*f*) The communication was subsequent to the will.
(*g*) [1902] 2 Ch. 793. Cf. the different conclusion reached on somewhat similar facts in *Irvine* v. *Sullivan* (1869), L. R. 8 Eq. 673.
(*h*) Overruling, on this point, Eve, J., [1902] 1 Ch. 214.
(*i*) [1902] 2 Ch. 866, 869.

the gap left by the testamentary dispositions, and thus "incorporate" it into the will. An inconsistency is, of course, fatal where the testator seeks to incorporate a document by express reference, but the applicability of this rule of construction to cases of trusts is unwarranted, since the latter arise dehors the will as much as if there was no reference contained in the testamentary instrument at all. These decisions were not discussed in *Blackwell* v. *Blackwell* but appear to have survived since this rule of construction was applied with renewed vigour in *Re Keen* (*supra*) and in *Re Jones* (*supra*). In the former case the testator had directed a legacy "to be held on trust . . . as may be notified by me during my lifetime". Communication had taken place prior to the execution of the will, but was rejected on the ground that the provision in the will referred exclusively to future communications and that the admission of a prior trust would contradict the terms of the instrument. A slight discrepancy of terminology proved fatal where in almost identical circumstances (*k*) a trust had been upheld in *Blackwell* v. *Blackwell*. As already referred to, Wright, M.R., added that, even if a subsequent communication had actually taken place, it would have been inadmissible, as the Court would not sanction the reservation by a testator of a power to make future unattested post-mortem dispositions.

The scope of this principle of construction was considerably extended by Simonds, J., in *Re Jones* (*l*). The testator bequeathed a legacy of £1,000 to X "for the benefit of Y or otherwise . . . as contained (in a deed poll) of even date with the will or any substitution, modification and addition thereof which I may execute hereafter". Contemporaneously he executed a deed poll which was in itself complete, and no further declarations were made before his decease. The learned Judge rejected the deed, though pointing out that, had the will not contained a reference to possible future alterations, the document would have been "incorporated". Since the admission of documents, for this purpose, is restricted to such as are in existence at the time of execution of the will, it was impossible to admit one part of the will without admitting another (*m*). But Simonds, J., after referring to *Re Keen*, then continued: "It is true that (in *Re Keen*) the reference was not necessarily to a document, since notification might have been oral. But I do not think that there can be any difference in principle between the two cases. The question is whether evidence is admissible to prove what is the document or notification referred to; and the decision is that such evidence is not admissible if on its true construction the reference is to notification both future and anterior or contemporaneous" (*n*). The tentative suggestion by Wright, M.R., in *Re Keen* (*o*) that, even if the wording of the will would have supported the construction of referring to both prior and

(*k*) The will directed the legacy to be applied "for the purposes indicated by me". (*l*) [1942] Ch. 328.

(*m*) It would have been different if the will had not suggested alternatives, but contained a resolutive condition, in which case evidence of the fact of subsequent alteration, though not its terms, would have been admissible. Cf. Cozens-Hardy, M.R., in *University College of N. Wales* v. *Taylor*, [1908] P. 140.

(*n*) At p. 334. It should be pointed out that *Re Jones* provided a true instance of a will involving the power of changing testamentary dispositions by unexecuted codicil. Exception is taken, not to the *ratio decidendi*, but to the comments on secret trusts.

(*o*) [1937] Ch. 236, 246.

subsequent communications, a trust *prior* to the will must fail, was here adopted by Simonds, J. Though it is sufficiently difficult to subscribe to the legal relevance of an inconsistency between the terms of the testamentary instrument and the dispositions of a trust, the rejection of a trust, not otherwise inconsistent with the will, on the ground that the will to which it relates referred to the *possibility* of future unwitnessed dispositions, constitutes the clearest departure from the principle established in *Blackwell* v. *Blackwell*. The judgments in *Re Keen* and *Re Jones* mark the eclipse of the equitable doctrine and confirm the impression that the rules of "incorporation" are in the process of being engrafted on the doctrine of secret trusts.

From the foregoing discussion, it must not be assumed that judicial practice has consistently followed this regrettable tendency. The view advocated in this article is illustrated by certain decisions which have not, however, received due consideration in the two recent cases. Thus, in *Re Spencer's W.* (*p*) the testator had left a legacy to A and B relying, though not by way of trust, upon their applying it towards objects communicated to them. The Court of Appeal ruled that evidence could be admitted to show whether a trust had been established since "whatever the words of the will may be . . . the Court is justified and bound to admit evidence for the purpose of seeing whether the circumstances which attended the communication by the testator to the legatees of his wishes (amounted to trusts)" (*q*). In spite of the express negation of a trust on the face of the testamentary instrument, evidence of the creation of a fiduciary relationship dehors the will was admitted. Since the mere reference to a trust in a testamentary instrument does not suffice to admit a document purporting to declare its terms, unless it has actually been communicated and accepted by the legatee, it was considered illogical to allow the will to govern the terms of admissibility of an independently established trust. This attitude was further clarified in *Re Falkiner* (*r*) where, in relation to an almost identical will, it was held that the evidence, though admissible, pointed to the conclusion that the legatees, having full knowledge of the will, agreed to give effect to the testator's wishes in accordance with the scheme of the will, including its provision that independent communication of his wishes should not be deemed to establish a trust. As Tomlin, J., observed: "It is quite plain that the clause in the will would not diminish the obligation of the donee who had undertaken to carry out the testator's wishes, unless the terms of the will were known to and were intended to be part of the arrangement. On the other hand, if it were intended to be part of the bargain which the parties made, it would become operative not by virtue of its being a term in the will, but by virtue of its being a term of the bargain" (*s*). The same reasoning is also implicit in the more recent

(*p*) (1887), 47 T. L. R. 519.
(*q*) *Per* Cotton, L.J., at p. 521.
(*r*) [1924] Ch. 88. This decision is irreconcilable with the judgments in *Re Keen* and *Re Jones*, since the testator had directed his legatees to hold in accordance with any communication to be made at any time during his life. Evidence of a communication prior to the will was admitted, although he had countenanced the possibility of future dispositions. In any case, Tomlin, J., was evidently prepared to admit evidence of a trust imposed subsequently to the execution of the will.
(*s*) At p. 96.

decision of *Re Williams* (*t*), which again placed the relationship between will and secret trust in its correct perspective. It is hoped that, upon renewed consideration of these issues, the Courts will be persuaded to reach decisions more clearly consistent with the principles enunciated by the House of Lords in *Blackwell* v. *Blackwell* than is apparent from the judgments in *Re Keen* and *Re Jones*.

STANDARD FORMS AND DELETIONS

By E. O. WALFORD, LL.D., Solicitor

The recent case of *Re Priestley's Contract*, [1947] 1 All E. R. 716, is interesting for the point which it decides; but it is a minor point which arose in that case which has inspired this article.

The Law Society's Conditions of Sale contain a condition (No. 6) which applies to cases in which the purchaser takes possession pending completion—a very usual practice under present conditions. It provides that the purchaser " shall, from the date of taking possession, and until the time of actual completion, or until the vendor resumes possession by reason of the rescission of the contract " pay interest (at the rate of £5 per cent. per annum) on the balance of the purchase money.

In *Re Priestley's Contract*, *supra*, it transpired that the purchaser had, with the consent of the vendor, taken possession of the property at or about the time when the contract was exchanged, although the contract provided that possession should be given on completion. However, it was expressly stated in the Special Conditions that the clause above mentioned as to payment of interest from the date of possession was to be " deemed to be omitted ". The completion did not take place by the date fixed for completion, and the question which arose was whether the purchaser was liable to pay interest on the balance of the purchase money from the date fixed for completion.

POSSESSION AND INTEREST

Now although under an open contract, where the vendor is in default, the purchaser can prevent interest from running against him by appropriating the balance of the purchase price and giving notice to the vendor of such appropriation, he cannot also stay in possession after the date fixed for completion and refuse to pay interest despite the fact that he is in physical possession or in receipt of the rents and profits, unless he has made an express bargain with the vendor to that effect : *Greenwood* v. *Churchill* (1845), 8 Beav. 413; *Adams* v. *Heathcote*, 10 Jur. 301; *Cowpe* v. *Bakewell* (1851), 13 Beav. 421; *Fludyer* v. *Cocker* (1805), 12 Ves. 25.

Condition 7 of the Law Society's Conditions of Sale which applied in *Re Priestley*, *supra*, enables a purchaser, except in a case to which

(*t*) [1933] 1 Ch. 244.

Condition 6 applies, to stop interest running, if the delay is not caused by his own act or default, by depositing the balance of the purchase money at a bank and notifying the vendor or his solicitors. However, Condition 6, or most of it, did apply, though the portion relating to interest was "deemed" to have been omitted. In addition to the provision last mentioned Condition 7 also provides that no interest shall be payable so long as delay in completion is attributable to (*inter alia*) default by the vendor in deducing title in accordance with the contract. It was clear that the vendor was in default in deducing title, but the purchaser was in possession, and the question was whether Condition 7 exempted the purchaser from liability to pay interest after the date fixed for completion. The sub-clause in Condition 7 dealing with the deposit of the balance of the purchase money at a bank expressly excepted cases covered by Condition 6 (*i.e.* where the purchaser had taken possession); but the other sub-clause in Condition 7 exempting a purchaser from paying interest of completion was delayed by default in deducing title contained no such exception. Condition 6 had to be construed as if sub-clause (2) (c) of that Condition was omitted, thus leaving the position to be construed as if Condition 7 applied in its entirety; but, at the same time, as if the purchaser had taken possession by consent. It was clearly possible to contend that as sub-clause (3) of Condition 7, unlike sub-clause (2) of that Condition, did not exclude cases where possession was taken, the exemption from liability to interest after the date fixed for completion conferred by sub-clause (2) applied whether the purchaser was in possession or not, and it was so contended on behalf of the purchaser. However, Romer, J., considered that it would require much clearer language to oust the principles of equity, in accordance with which a purchaser remaining in possession or in receipt of the rents and profits was required to pay interest.

An Analogy

The decision above dealt with reminds me of the practice followed by some practitioners of deleting the portion of the National Conditions which states that the loss on a resale shall be recoverable by the vendor from the defaulting purchaser. The thought is, of course, that the vendor must thereupon accept the deposit in satisfaction of any loss which he incurs if the purchaser does not complete. Whilst it is impossible to say with certainty that this thought is a mistaken one and that the deletion of the printed provision in the National Conditions is in fact nugatory, it can be said that if the contract is read (as it should be) as if the general law applied in that respect then the vendor would be entitled to recover the expenses of resale, after giving credit for the deposit: see *Lamond* v. *Davall* (1847), 9 Q. B. 1030; *Howe* v. *Smith* (1884), 27 Ch. D. 89; *Ockenden* v. *Henly* (1858), E. B. & E. 485; cf. *Shuttleworth* v. *Clews*, [1910] 1 Ch. 176.

The Amputation of Conditions

When effecting deletions from a printed contract it should be considered what effect the general law will have. If, for example, the common law is almost, but not precisely, the same it would, in general,

be reasonable to assume that the object of deleting the printed provision was to leave the common law rule in force; and it is submitted that such an assumption will be made even more readily if the distinction between the common law and the printed condition is substantial. But would that view necessarily prevail if it was obvious from the evidence that the deletion was effected at the instance of a party who would fare worse at common law? Possibly it would, for it is not for the Courts to reframe the contract in such manner as will in the opinion of the Court do justice between the parties. The parties must normally abide by the terms of the written contract, and the Court cannot allow itself to become involved in a consideration of the mental processes of the parties prior to the exchange of the contract, apart from fraud.

What, then, is the effect of a provision declaring that the deposit shall be forfeited and that the vendor may resell in case of default but not providing that any loss on a resale shall be made good by the purchaser?

In *Harold Wood Brick Co., Ltd.* v. *Ferris*, [1935] 2 K. B. 198, the Court of Appeal came to the conclusion that it was unnecessary for the vendor to rely upon the special provision in the contract, and that as, at common law, he was entitled to treat the purchaser's conduct as a substantial breach amounting to repudiation of the contract and to recover damages accordingly it was unnecessary to consider the effect of the express provision entitling the vendor to declare the deposit forfeited and to resell. From a practical point of view it is therefore immaterial whether the contract does or does not contain provisions entitling the vendor to resell and to recover any loss on such resale or either of such conditions, provided that the vendor does show his intention to treat the contract as repudiated, and does not merely state that the contract is being treated as rescinded, without more.

In other words, it is clearly not safe to assume, when revising a draft contract on behalf of a purchaser, that the deletion of the printed condition stating that the vendor shall be entitled to recover any loss upon a resale is tantamount to a declaration that he shall not be so entitled. The appropriate course is to declare that the terms of the printed condition are expressly negatived, or preferably, that in case of default by the purchaser the deposit shall be forfeited to the vendor, who shall accept it in full satisfaction of all claims against the purchaser under the contract. Even if this course is followed it is not quite certain that the vendor is bound by such a provision. It is an open question, where a sum is specified as liquidated damages, whether the party entitled may ignore the condition and sue for damages at large, and thus recover, possibly, a sum in excess of the specified damages. There are a good many *dicta* in this connection: see, for example, *Wall* v. *Rederiaktiebolaget, etc.*, [1915] 3 K. B., at p. 72, and *Watts, Watts & Co.* v. *Mitsui, etc., Co.*, [1917] A. C., at p. 245. This question was, however, left open in the later case of *Cellulose Acetate Silk Co.* v. *Widnes Foundry (1925), Ltd.*, [1933] A. C. 20. Obviously such a question, in relation to the sale of land, will not often arise, because the purchase price will normally be based on a fair assessment of the market price, so that the forfeiture of the ten per

cent. deposit by way of liquidated damages will generally be sufficient to cover the loss of the vendor if the sale goes off. *Icely* v. *Grew* (1836), 6 N. & M. 467, in which it was laid down that a provision stating that the deposit should be forfeited as liquidated damages did not prevent the vendor from claiming damages at common law, has been criticised : cf. *Lea* v. *Whitaker* (1872), L. R. 8 C. P. 70.

However, the question arising out of the cases above mentioned is one of the general law and cannot be dealt with by any special clause. The point to which it is desired to draw attention is that the mere deletion of a printed condition does not necessarily produce an effect precisely opposite to the effect of the printed condition itself.

Rescission and Damages

In the *Harold Wood Brick Co. Case*, *supra*, the contract contained a provision which entitled the vendor, upon default by the purchaser, to treat the deposit as forfeited and to " rescind the sale and resell the property " without stating that any loss on the resale might be recovered from the purchaser. Now it is very well settled that upon the rescission of a contract no damages can be awarded, *Henty* v. *Schroder* (1879), 12 Ch. D. 666; *Hutchings* v. *Humphreys*, 54 L. J. Ch. 650, though the Court may declare that the deposit has been forfeited : *Hall* v. *Burnell*, [1911] 2 Ch. 551; *Farrant* v. *Olver* (1922), 127 L. T. 145.

In the *Harold Wood Brick Co. Case* the vendors, presumably acting under the condition entitling them to " rescind " and resell, gave notice of rescission but added to the notice a statement that the purchaser would be held liable in damages for the breach of his agreement. The Court of Appeal were therefore faced with a peculiar position. The rights of the vendors upon a substantial breach of the contract were as follows :—

(1) They could treat the contract as rescinded and sell under their title as absolute owners; or

(2) They could affirm the contract and claim damages for its breach.

If, however, they rescinded and sold as absolute owners they could not avail themselves of the right to claim damages under the contract : *Howe* v. *Smith* (1884), 27 Ch. D. 89; *Low* v. *Fry* (1935), 152 L. T. 585.

In the *Harold Wood Brick Co. Case* the vendors had not clearly taken either of these courses. The Court had, however, to determine the effect of the vendors' notice, and considered that the vendors were not relying upon the stipulation in the contract, but were alleging a breach of the contract amounting to repudiation, and entitling them to damages at common law, and that such damages were in fact recoverable.

Thus matters rested until 1945 when the case of *Barber* v. *Wolfe*, [1945] 1 All E. R. 399, came before Romer, J. The vendor had obtained a decree of specific performance, but the purchaser failed to complete. The vendor, thereupon, applied by motion for an order rescinding the contract. As the purchaser had been in occupation of the property the vendor claimed an occupation rent by way of damages. It has already been mentioned that a claim for damages cannot be joined

with a claim for rescission; but it was argued that in the *Harold Wood Brick Co. Case* although the contract had been rescinded the Court had awarded damages. Faced with this point Romer, J., was compelled either to overrule the decisions which have laid down the rule that there can be no award of damages in cases where the contract is rescinded, or to find some explanation of the *Harold Wood Brick Co. Case*. As I have indicated, the Court of Appeal in that case apparently considered that the plaintiff had not shown an intention to rescind the contract but rather to treat it as repudiated, evidently thinking that the word "rescind" had been employed by mistake and that the plaintiff vendor's true intention was clear from the further intimation that the purchaser would be held liable in damages, which was impossible if the vendor was in fact claiming rescission. Accordingly Romer, J., considered that there was no sufficient ground for disturbing the rule prohibiting the award of damages where there is a true rescission of the contract. There is no doubt that the rule prohibiting the award of damages in connection with the rescission of a contract for the sale of land is now firmly established. It is said that the essential point in connection with rescission is that the parties are to be restored, so far as possible, to their respective former positions, *i.e.*, there is to be *restitutio in integrum*. If that were correct it would be reasonable to expect that the vendor would return the land and the purchaser would receive back his deposit. In point of fact this does not happen where the purchaser is in default. The authorities to that effect are overwhelming: see *Henty* v. *Schroder* (1879), 12 Ch. D. 666; *Hall* v. *Barnell*, [1911] 2 Ch. 551; *Farrant* v. *Olver*, 127 L. T. 145. On the other hand, if the vendor is in default and the purchaser rescinds it is equally well settled that the purchaser may obtain an order for the return of the deposit with interest and the payment of his costs of investigating title: *Re Hare and O'More*, [1901] 1 Ch. 93; *Re Walker & Oakshott*, [1901] 2 Ch. 383; *Re Smith & Stott* (1883), 29 Ch. D. 1009 n.; cf. *Re Higgins & Percival* (1888), 57 L. J. Ch. 807. It seems clear, therefore, that upon rescission of a contract for the sale of land the notion of *restitutio in integrum* is not fully applied. Otherwise it would not be possible to make a different order where the vendor was in default from that which is made when the purchaser is in default. On the other hand, the decision in *Clark* v. *Wallis* (1866), 35 Beav. 460, that upon rescission a purchaser who has received rents and profits must refund them to the vendor is clearly in accordance with the principle of *restitutio in integrum*. Yet in *Barber* v. *Wolfe*, *supra*, where the contract was rescinded owing to the purchaser's default, the vendor was not allowed to recover a rent for use and occupation from the purchaser who had been in possession. This was not new law, for the point was covered by the much earlier case of *Hutchings* v. *Humphreys*, *supra*. Presumably such an item is to be regarded as damages, and therefore irrecoverable in rescission proceedings.

CONCLUSION

I am disposed to think that this present article might be concluded with the abbreviated phrase "Verb. sap." However, for the benefit of those who prefer a plainer statement I would add that my intention

in writing this article was to draw attention to the fact that the deletion of a printed condition is an operation not lightly to be undertaken, and that in general it is desirable to state also that its terms are expressly negatived, or to state precisely what is to happen in the circumstances envisaged by the condition. In some cases it may suffice to state that the general law is to apply. In others it may not be possible to be so brief. I think that the cases referred to in this article suggest also that it must be very seldom that a vendor is wise to take proceedings for specific performance. The order for specific performance does not produce the money with which the purchaser can complete the purchase. If the purchaser cannot do so the vendor must first discharge his action for specific performance and then claim rescission of the contract. He may then get rid of the contract; but if he is seeking damages in excess of the deposit he will not obtain them. Generally, damages are a sufficient solatium for a vendor. He retains the land and is entitled to recover from the purchaser any loss suffered by him in excess of the deposit which he will retain in full.

My final submission is that when a clause is being added to or deleted from a printed form of contract, the only safe course, laborious though it may be, is to peruse every other clause in the contract, and to decide whether any consequential alteration of those clauses is necessary in order to avoid the possibility of a lawsuit. I have referred particularly to printed forms of contract because of the very common practice of incorporating printed General Conditions of Sale. I do not intend to suggest that less care is necessary in relation to deletions from typed or handwritten forms of draft contract.

STATUTORY CHARGES ON LAND *

By J. F. Garner, LL.M., Solicitor of the Supreme Court

The rule of the common law with regard to the user of land has always been that, provided the maxim " sic utere tuo ut alienum non laedas " is observed, an Englishman's home is his castle. While this may still be an accurate description of the duties of the owner or occupier of land towards adjoining owners or occupiers, he is now subject to statutory restrictions in respect of his duties to the community at large that very seriously affect his power to do what he likes with his own. A prospective purchaser of land is therefore most concerned to discover, before it is too late, the nature and effect of the statutory restrictions binding the land he proposes to purchase.

These charges may be considered under three main headings, *viz.*, those registrable under the Land Charges Act, 1925 (hereafter referred to as " L.C.A.") or in the charges register under the Land Registration

* This article went to press before the Town and Country Planning and Agriculture Bills became law.

Act, 1925 (hereafter referred to as "L.R.A."), charges under the Town and Country Planning Bill, 1947, and the Agriculture Bill, 1947, and other charges not registrable under L.C.A. or L.R.A.

(1) Registrable Charges

"Registration is actual notice to all the world." This is one of the main general principles of the 1925 Property legislation (see, *e.g.*, section 198, Law of Property Act, 1925), and it is therefore important that searches should be carried out before contract; see *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379, and an opinion thereon obtained by the Council of the Law Society, published in the Society's *Gazette* for May, 1947, at p. 97. Moreover, the unfortunate prospective lessee, who has no right to call for proof of his lessor's title (unless he has wisely provided otherwise in that rare document, a contract for a lease), is not protected from the consequences of the general rule by reason of the fact that he has had no opportunity of inspecting the charges register of the lessor's (registered) title, or of knowing the names of the estate owners against whom he should have searched in the Land Charges Registry (in the case of unregistered land); *White* v. *Bijou Mansions*, [1937] Ch. 610. Moreover, if a statutory charge is registrable under L.C.A. or L.R.A., and it is not in fact so registered, it is void as against a purchaser (*a*). A purchaser can therefore safely proceed so far as registrable charges are concerned, if he has searched and found no charge registered. It is now therefore proposed to consider what searches should be made, and the statutory charges they may be expected to reveal, if any.

(a) *Land Charges* (see section 10, L.C.A., and sections 3 (ix) and 59 (2), L.R.A.). Land charges, other than local land charges, are registered at the Land Charges Registry in London, or a "notice caution or other prescribed entry" in respect thereof is entered on the charges register of the title in the case of registered land. As a general rule, statutory charges are not expressed to operate as land charges of this type, but the following provide exceptions to this:—

(i) Class A land charges (see section 10 (1), L.C.A.). These are financial charges as enumerated in the section, "created pursuant to the application of some person".

(ii) Agreements by the owner of land (*i.e.*, the person receiving the rack-rent (*b*) of the premises)—but not, apparently, the occupier—with statutory water undertakers "with respect to the execution and maintenance of such works as the undertakers consider necessary for the purpose of draining that land, or for more effectually collecting, conveying, or preserving the purity" of certain water, provided such agreements are expressed to be binding and enforceable against the owner's successors in title, are registrable as Class D land charges; Water Act, 1945, section 15.

(*a*) L.C.A., s. 13 and 15 (1): "Purchaser" is defined (s. 20 (8)) as meaning "any person who, for valuable consideration, takes any interest in land or in a charge on land", but in the case of Class D land charges and estate contracts (Class C (iv)), this provision applies only in favour of "a purchaser of a legal estate for money or money's worth", and in the case of local land charges, only in favour of "a purchaser for money or money's worth of a legal estate in the land affected thereby".

(*b*) See definition in s. 343 (1) of the Public Health Act, 1936.

(iii) It seems that a "forestry dedication covenant" entered into under section 1 of the Forestry Act, 1947, would properly be registrable as a land charge. No mention of registration is made in the Act, which provides, however, that as respects the enforcement of such a covenant against persons other than the covenantor, the Forestry Commisioners "shall have the like rights as if they had at all material times been the absolute owners in possession of ascertained land adjacent to the land in respect of which the covenant is sought to be enforced and capable of being benefited by the covenant, and the covenant had been expressed to be for the benefit of that adjacent land". It is also provided that section 84 of the Law of Property Act, 1925 (providing for the modification of restrictive covenants by the Court in certain circumstances) shall not apply. It is submitted that these provisions of the Act indicate that a forestry dedication covenant should be regarded as being in every way similar to a restrictive covenant, and that it is therefore registrable as a Class D (ii) land charge.

(iv) It must be emphasised that what is registrable in the Registry (and this applies equally to the local land charges register to be hereafter discussed) is a right over land, and not the fact that a right may hereafter be exercised in respect of a particular parcel of land (*c*). Thus, in *Lewisham Borough Council* v. *Maloney*, [1947] 2 All E. R. 36, the Court of Appeal held that the rights of user and possession arising on the exercise of the powers of requisitioning given to a town clerk under Defence Regulation 51 (*d*), did not require to be registered as a land charge so as to prevent their being void as against a purchaser of a legal estate in the property; this was held to be so even where the requisitioning notice was not followed up by the taking of physical possession on behalf of the competent authority. Several reasons were given for this decision, and it was said, *per curiam*, "we thought there was considerable force in the argument that regulation 51, on its true construction, conferred a right of taking possession good as against all the world and not liable to be voided by a failure to take a step—namely registration—not referred to in the regulation".

(b) *Local land charges.* These are registrable (under section 15, L.C.A.) in the registers maintained by the clerks to local authorities throughout the country, and are not registrable in the Land Charges Registry, or under L.R.A., under which latter Act they are included in the list of overriding interests (section 70 (1) (i)). It is not proposed here to detail the complete list of these charges, but merely to indicate their general nature, to mention a few of the more recent additions to the list, and to discuss some of the commoner difficulties arising in practice.

Local land charges are described in L.C.A. as including (see section 15 (1)) any charge "acquired by the Council of any administrative county, metropolitan borough, or urban or rural district, or by

(*c*) New legislation, however, provides examples of exceptions to this general principle; *e.g.*, lists of buildings of architectural or historic interest under cl. 28 (6) of the Town and Country Planning Bill, 1947, and designation orders under the New Towns Act, 1946 (*infra*).

(*d*) Made under the Emergency Powers (Defence) Acts, 1939 and 1940, and continued in force by the Supplies and Services (Transitional Powers) Act, 1945.

the corporation of any municipal borough or by any other local authority, under the Public Health Acts, 1875 to 1925, the Metropolis Management Acts, 1855 to 1893, or the Private Streets Works Act, 1892, or under any similar statute (public general or local or private) passed or hereafter to be passed, which takes effect by virtue of the statute". In the Schedule to the Law of Property Amendment Act, 1926, this definition elaborated but no substantial change in the nature of a local land charge was made.

The registers are divided into eight Parts as follows :—

Part I.—Register of general financial charges (arising under section 15 (4) of the L.C.A.), the commonest example of which is a provisional apportionment under the Private Street Works Act, 1892, or section 150 of the Public Health Act, 1875.

Part II.—Register of specific financial charges and priority notices relating thereto. These include charging orders under section 291 of the Public Health Act, 1936, and section 20 of the Housing Act, 1936; final apportionments for private street works; etc.

Part III.—Register of planning charges. In this Part are registered all resolutions to prepare or adopt town and country planning schemes (under section 6 of the Town and Country Planning Act, 1932), and also the notional resolutions deemed to have taken effect on October 22, 1943, under section 1 of the Town and Country Planning (Interim Development) Act, 1943. The interim protection of trees (1943 Act, s. 8), orders prohibiting the use of land for the purpose of enforcing interim development control (*ibid.*, s. 5), and permits for interim development, are also registrable in this Part of the Register. It has been suggested that agreements under section 34 of the Town and Country Planning Act, 1932 (which now need the approval of the Minister under section 10 of the 1943 Act), made by a landowner with a planning authority restricting the planning, development or use of the land in any manner in which those matters might have been dealt with in a planning scheme, should also be registered in this Part. It is provided under that section, that such agreements may be enforced by the planning authority against persons deriving title under the owner " in the like manner and to the like extent as if the authority were possessed of or interested in, adjacent land, and as if the agreement had been entered into for the benefit of that adjacent land". This, it is submitted, amounts to a " charge acquired by a local authority", and is therefore registrable as a local land charge and will be void as against a purchaser if not so registered. The whole of this Part of the Register will, it seems, disappear when the Town and Country Planning Bill, 1947, comes into force (see below).

Part IV.—This is a miscellaneous register of prohibitions and restrictions not falling under any of the other eight Parts. Under this Part will be found such charges as prohibitions on advertisements affecting the amenities of an area registered under byelaws made under the Advertisements Regulation Acts, 1907 and 1925; building lines; clearance orders (Housing Act, 1936, Part III); new streets (Public Health Act, 1925, s. 30); and notices to treat in pursuance of a compulsory

purchase order made under the Acquisition of Land (Authorisation Procedure) Act, 1946 (*e*) (*f*).

Part V.—A register of charges acquired under section 8 (3) (c) of the Agriculture (Miscellaneous Provisions) Act, 1941, being charges incurred by the county council in respect of work for the improvement of a way over fen-land (*g*).

Part VI.—Register of compulsory purchase orders and declaratory orders made under Part I of the Town and Country Planning Act, 1944 (*h*).

Part VII.—Register of compulsory purchase orders and designation orders made under the New Towns Act, 1946 (*i*).

Part VIII.—Certain orders made by the Minister of Civil Aviation under sections 27, 29 and 37 of the Civil Aviation Act, 1946, are here registrable. These are for obtaining rights over land, for controlling the use of land, and restricting the use of land for the purpose of a civil aerodrome (*k*).

It should be noted that in some instances (*e.g.*, restrictive covenants imposed by a local authority on the sale of land owned by the authority, enforceable under section 148 of the Housing Act, 1936), the respective provinces of the Land Charges Register (or the charges register in the case of registered land) and the local land charges register may overlap. Section 21, L.C.A., however, provides that it is sufficient if any matter capable of registration under two or more Parts of the Act is registered only under any one Part thereof. In practice, local authorities normally register such covenants in their own local registers.

It is here relevant to point out that local land charges registers are maintained by district councils, and also (except in the case of a county borough) by county councils. Those local land charges of most frequent occurrence in practice are those registrable in the district council registries, but if the property abuts on a trunk or county road, a "standard width" may have been prescribed under the Restriction of Ribbon Development Act, 1935, by the county council, as agent for the Ministry of Transport, or as highway authority, and then such standard width will be registered as a local land charge by the county council. Expenses incurred by the county council under the Agriculture (Miscellaneous Provisions) Act, 1941 (see Part V, *supra*), and certain other financial charges may also be registered in the county council's registry.

Only specific prohibitions or restrictions (except those registrable under Part I) are registrable as local land charges, and therefore

(*e*) This would also appear to be the appropriate Part of the Register in which should be registered the "permitted price" and the "permitted rent" of new houses, registered under the Building Materials and Housing Act, 1945, ss. 7 and 8.

(*f*) For Parts I to IV see the Local Land Charges Rules, 1934 (S. R. & O., 1934, No. 285/L.4), as amended by the Local Land Charges (Amendment) Rules, 1943 (S. R. & O., 1943, No. 1532/L.32).

(*g*) See Local Land Charges (Amendment) Rules, 1942 (S. R. & O., 1942, No. 786/L.8).

(*h*) See the Town and Country Planning Act, 1944 (Registration of Orders) Rules, 1945 (S. R. & O., 1945, No. 1677/L.24).

(*i*) See the New Towns Act, 1946 (Registration of Orders) Rules, 1946 (S. R. & O., 1946, No. 1896/L.23).

(*k*) See the Civil Aviation Act, 1946 (Registration of Orders) Rules, 1947 (S. R. & O., 1947, No. 1622/L.19).

a compulsory purchase order (subject to specific statutory provision to the contrary; *e.g.*, section 17 of the Town and Country Planning Act, 1944) is not registrable, for it has no effect on the land until it is put into operation by notice to treat, which is registrable in Part IV as above mentioned. Similarly, a general direction by a local planning authority under article 5 (1) of the Town and Country Planning (General Interim Development) Order, 1946 (S. R. & O., 1946, No. 1621), to the effect that development of a description specified in article 4 (1) of the same Order shall not take place in the whole of that authority's area without their permission is, it seems not registrable. A prospective purchaser can only ascertain whether any such order or direction has been made by making specific inquiry of the planning authority or of his vendor, who may in fact be ignorant of the existence of any such charge.

(2) CHARGES UNDER THE TOWN AND COUNTRY PLANNING BILL, 1947

As we have seen, planning charges under the existing law are registrable as local land charges in Part III of the registers. Most of the present town planning legislation is, however, to be repealed and replaced when the Town and Country Planning Bill, 1947, comes fully into operation—the Advertisements Regulation Acts and the Town and Country Planning Acts of 1932 and 1943 will be repealed *in toto*, and much of the 1944 Act is affected by the new statute. Under this Bill, interim development will disappear, and, as from the " appointed day ", no development (which is defined widely so as to include any material change in the use of any buildings or other land; see clause 11) will be permitted, subject to certain exceptions, without the consent of the planning authority. Application to such authority for permission to develop may be granted unconditionally, granted subject to such conditions as they think fit, or refused, and if it is refused or conditions are imposed, the intending developer may be entitled to compensation and/or to appeal to the Minister (clause 15). A refusal to permit development of a certain type, or conditions imposed on a permission to develop, are enforceable by the planning authority by means of an enforcement notice, against which there is a right of appeal to petty sessions (cf. section 5 of the 1943 Act). In the event of an enforcement notice not being complied with, the planning authority may carry out any work ordered in the notice at the expense of the owner of the land (such expenses are stated to be recoverable as a simple contract debt; they are not, apparently, a charge upon the land), and use of the land in contravention of the notice constitutes a summary offence (clause 23). Moreover, in the event of planning permission being given, a development charge payable to the Central Land Board established by the Act, must be determined, and paid by the intending developer (clause 66). The Board may charge " the interest of any person in the land with the payment of any [such] sums so payable by that person or by any of his predecessors in title ". Such a charge is registrable as a Class A land charge under L.C.A., s. 10, and the Central Land Board have the powers of mortgagees by deed (clause 71). It is therefore most important that prospective purchasers of land should have full opportunity of ascertaining what applications for permission to develop have been made, the decisions

of the planning authority thereon, and whether the development charge (if any) has been paid in full.

Provision for publication of applications for permission has been made in clause 13 (5) of the Bill, which stipulates, not that they shall be registered in the appropriate local land charges registry, as might have been expected, but that "every local planning authority shall keep in such manner as may be prescribed [by the development order] a register containing such information as may be so prescribed with respect to applications for permission made to that authority, including information as to the manner in which such applications have been dealt with; and every such register shall be open for inspection by the public at all reasonable hours". The following points of interest to conveyancers arise in connection with this provision:—

(a) The term "development order" refers to an order to be made by the Minister under the Act, which may be applicable to "all land", or "only to such land as may be so specified"; (clause 12 (2)). There is, therefore, no guarantee that there will be uniformity of practice in the maintenance of these registers throughout the country, as is the case with local land charge registries.

(b) No provision is made in the Bill for searches to be made otherwise than by inspection, or for official certificates to be given (cf. section 17, L.C.A.).

(c) The local planning authorities will be normally the county councils (who may have power to delegate some or all of their functions to district councils: clause 32) and county borough councils, or in some cases, joint planning boards. Town planning inquiries will therefore have to be made of such authorities, in addition to the local land charges searches at the district councils' registries.

(d) No provision is made for the registration of an enforcement notice, and no effective means is provided for informing a prospective purchaser of its existence.

(e) These new planning restrictions will bind a purchaser even if they are not in fact registered under clause 13 (5), although a purchaser would no doubt not be deemed to have had notice thereof unless they had been so registered, and he would then be able to claim rescission or an abatement of the purchase price if his vendor had not fully informed him of the facts (*l*).

In addition to the above, planning authorities have the further powers of planning control under the new Bill set out below (with or without the consent of the Minister, as the case may be):—

(a) They may order the discontinuance of a certain use of land, etc., subject in certain circumstances to the payment of compensation (clauses 24 and 25).

(b) They may make a "tree preservation order" (clause 26).

(c) They may make a "building preservation order", restricting the demolition, alteration or extension of a building of special architectural or historic interest (clause 27). In connection with this

(*l*) A purchaser will, however, have no remedy where the vendor has no knowledge of an enforcement notice (this is quite possible, even when the notice has been validly served under cl. 102), or where the planning charge has arisen subsequent to the last requisition or enquiry made by the purchaser; see, *e.g.*, *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 625, and *Williams on Vendor and Purchaser* (4th ed.), p. 635, n. (*y*).

power, the Minister may compile a list of such buildings, which list is then registrable in the local land charges register(s) (clause 28 (6)). Failure to compile and/or register such a list does not, however, affect the validity of a building preservation order.

(d) The Minister may make regulations restricting or regulating the display of advertisements; breaches of such regulations may be enforced by the planning authority by means of enforcement notices (clause 29).

(e) The authority may serve a notice requiring the abatement of injury to the amenities of any part of an area "by the condition of any waste or other land in the area" (clause 31).

(f) Planning authorities also have wide powers of compulsory purchase, in order that their development plans may be put into execution, provided the land acquired is designated as being subject to compulsory purchase in the development plan. Such designation is reminiscent of designation orders made under the New Towns Act, 1946, but unlike that statute, the new Bill does not provide that the designation of land as being subject to compulsory purchase shall be registrable as a local land charge. It would be argued, presumably, by the draughtsmen of the Bill that such a provision is unnecessary, for the development plan is to be open to inspection at the offices of the planning authority, and interested parties should make inquiry. Normally the Acquisition of Land (Authorisation Procedure) Act, 1946, will apply to such compulsory acquisitions, but clause 38 of the Bill establishes a shortened procedure of compulsory acquisition in certain circumstances, and in these cases the compulsory purchase order itself is registrable as a local land charge.

(3) Charges Under the Agriculture Bill, 1947

In so far as this Bill will impose charges on land binding on purchasers, its more important provisions, unlike those of some other statutes, are linked with the L.C.A. Apart from giving the Minister of Agriculture and Fisheries and small holdings authorities (see clauses 47 *et seq.*) very wide powers of compulsory purchase (which are made exercisable following the admirable precedent in this regard of the Town and Country Planning Bill, by the procedure laid down in the Acquisition of Land (Authorisation Procedure) Act, 1946) the following are the main provisions of the Bill in so far as they affect the subject-matter of this article:—

(a) In the first place it must be explained that the Bill applies only to "agricultural land", but this is defined (in clause 109 (1)) to mean "land used for agriculture which is so used for the purposes of a trade or business", and includes land designated by the Minister for the purposes of the definition, and also "any land so designated as land which in the opinion of the Minister (*m*) ought to be brought into use for agriculture". "Agriculture" itself is defined very widely (clause 109 (3)). This definition is particularly important if the intending purchaser is proposing to let any part of the land, for the clauses of the Bill concerning the terms of tenancy agreements of agricultural land strengthen the provisions of the Agricultural

(*m*) This is a subjective, not an objective test; see the construction put on similar words in *Liversidge* v. *Anderson*, [1942] A. C. 206.

Holdings Act, 1923, and very considerably restrict the freedom of the lessor landowner.

(b) Under clause 12 of the Bill, where the Minister is satisfied that the owner of agricultural land is not managing the land " in accordance with the rules of good estate management " (see clause 10), or the occupier is not farming " in accordance with the rules of good husbandry " (see clause 11) the Minister may make a " supervision order " in respect of the land. This has the effect of placing the owner or occupier under the Minister's supervision, and entitles the Minister to make certain directions (clause 14), to purchase the land compulsorily (clause 16), to evict the tenant (clause 17), and to take possession of the land (clause 18). Such a supervision order must be registered in the local land charges register (clause 12 (6)) and consequently when a search reveals such an order, the purchaser, if he intends to proceed, should inquire what orders or directions have been made or given under the supervision order.

(c) An agricultural tenant is entitled to certain compensation from his landlord for improvements and disturbance (see Part III of the Bill) and if this is not paid within one month, the person to whom the sum is due may " obtain from the Minister an order in favour of himself, his executors, administrators and assigns charging the holding with repayment of the amount due ". Such charge ranks in priority to any other charge, and is registrable under section 10 of the L.C.A., presumably as a Class A land charge (see clause 41).

(d) In addition the Minister has power to serve notices on occupiers of agricultural land giving directions as to the use of the land or the carrying out of any work, etc., in certain circumstances (clause 95). Further, the Minister may by notice in writing require any person to take such steps as may be necessary for the killing or destruction of pests (clause 98). These notices do not require to be registered, and it seems that a purchaser can only discover the existence of any such outstanding notices by making inquiry or requisition of his vendor.

(4) Other Non-Registrable Charges

Many statutes give local and other authorities power to acquire land compulsorily, but the procedure adopted on such acquisition has now been standardised by the Acquisition of Land (Authorisation Procedure) Act, 1946, which, with the Acquisition of Land (Assessment of Compensation) Act, 1919, now provides a complete code for such cases. This code applies to all compulsory acquisitions, except those authorised by the Town and Country Planning Act, 1944 (the relevant portions of which will be repealed by the 1947 Bill), Part III of the Housing Act, 1936, the Light Railways Acts, 1896 and 1912, and in certain circumstances, the Electricity (Supply) Acts, 1882–1936. The specific powers (under the Requisitioned Land and War Works Act, 1945, as amended by the Acquisition of Land (Authorisation Procedure) Act, 1946) of compulsory purchase which arise where government war works (*n*) have been done on the land, or where land

(*n*) These terms are defined to include work done, etc., under emergency powers by, or by arrangement with, the Crown during the period August 24, 1939, to February 24, 1946.

has been damaged by government war use, or where the land has been requisitioned for such purposes, should be noted. These powers include, in certain circumstances, a power to pay compensation based on the value of the land as it was before the war works, etc., were executed thereon.

Apart from powers of compulsory purchase, many statutes impose specific restrictions on land which are not registrable under L.C.A. or L.R.A., and it is here proposed to discuss the more recent of these statutes.

(a) The local authority may make an agreement with the owner or occupier of any trade premises as to the reception and disposal of trade effluent on his premises, and this agreement must be deposited at the offices of the local authority and there made available for inspection (Public Health (Drainage of Trade Premises) Act, 1937). Such an agreement would not be binding on a subsequent owner of the land, but as it would in general be beneficial to the owner thereof, it is important that a prospective purchaser should know of its existence, so as to ensure that he secures similar terms from the local authority, and he should therefore inquire on the point of his vendor and of the local authority.

(b) Under the Access to Mountains Act, 1939, the Minister of Agriculture and Fisheries may make an order imposing certain restrictions as detailed in the Act on the owner or occupier of land. Copies of orders made thereunder must be deposited with the clerk to the county council. The Act has not yet been implemented (*o*), but should orders be made thereunder, a purchaser should make appropriate inquiries of the county council.

(c) Various restrictions may be imposed under the Water Act, 1945. Thus, the Minister of Health may require "any class of persons to keep such records and furnish such returns as to the quantity and quality of water abstracted by them from any source, and as to such other matters relating to the source as may be prescribed" (section 6). The Minister may also make an order controlling the abstraction or prevention of waste of water in a defined area, and licences may subsequently be granted under such orders (section 14); a copy of any order made under this section must be deposited with the local authority, and a purchaser should therefore, in addition to covering the point in his inquiries and requisitions, make inquiry thereon of the local authority. Under section 7, landowners must notify to the Committee of the Privy Council for Scientific and Industrial Research (*p*), their intention to sink wells or boreholes exceeding fifty feet in depth for the purpose of searching for or abstracting water.

(d) The Furnished Houses (Rent Control) Act, 1946, imposes yet a further burden on the purchaser's advisers. Under this Act, where a rent tribunal has fixed the rent payable under a particular furnished letting, such rent must be registered in a register maintained by the local authority, and this register must be kept open for public

(*o*) The Minister has recently stated in the House of Commons that no orders have been made under the Act (*Hansard*, for July 7, 1947).

(*p*) Teddington, Middlesex.

inspection during ordinary office hours (*q*). There is provision for a certified copy of any entry in the register to be supplied on payment of the prescribed fee of 1s., which copy is "receivable in evidence" of the entry. The effect of section 4 of this Act is to make it illegal to charge more than the registered rent for the premises, and it is therefore clearly the concern of a purchaser to ascertain whether a rent has been registered under the Act.

(e) Section 26 (6) of the Civil Aviation Act, 1946, provides that "where any person having an interest in land (hereinafter referred to as "the grantor") grants or agrees to grant [verbally?] to the Minister of Civil Aviation any right (whether in perpetuity or for any other period and whether capable of subsisting as a legal estate or not) in or in relation to that land . . . the grant or agreement shall be binding upon any person deriving title or otherwise claiming under the grantor to the same extent as it is binding upon the grantor, notwithstanding that it would not have been binding upon that person apart from the provisions of this sub-section". Such a provision covers both restrictive covenants and easements, and includes rights which would clearly not be registrable under L.C.A. and L.R.A.; again the only protection to a prospective purchaser is to inquire and requisition of his vendor.

(f) Under section 3 (4) of the Hill Farming Act, 1946, it is provided that every person who has an interest in land on which, in accordance with a "hill farming land improvement scheme" drawn up under the Act, "any work is to be done, and who has joined in submitting the scheme or consented to the approval thereof, or has consented to the variation thereof, as the case may be, and every person deriving title to any interest in that land through or under or in succession to any such person, shall be under obligation to permit the doing on the land of all things reasonably necessary to be done thereon for the doing of the work and the maintenance of the improvement". This section imposes a burden on the land, but not, it is submitted, one of a type registrable under L.C.A. and L.R.A. A prospective purchaser can cover himself on this point only by inquiry and requisition of his vendor.

(g) Under the Atomic Energy Act, 1946, the Minister of Supply is given one of the most widely drawn powers that can ever have been given to a Minister of the Crown. By sections 6 and 7 of the Act, he is empowered to do work on land for the purpose of discovering minerals, and compulsorily to acquire rights to work minerals "from which in his opinion any of the prescribed substances can be obtained". The definition of "prescribed substance" (see section 18 (1)) includes "any such other substance as the Minister may by order prescribe, being a substance which in his opinion (*r*) is or may be used for the production or use of atomic energy or research into matters connected therewith". Again the prospective purchaser can only find out about such charges by inquiry or requisition of his vendor.

It has been pointed out that in several of the above cases it is essential that a prospective purchaser should make inquiry of the

(*q*) Furnished Houses (Rent Control) Regulations, 1946 (S. R. & O., 1946, No. 781).
(*r*) See note (*m*), *supra*.

appropriate local authority. The Law Society, the Joint Standing Committee of the Society of Clerks of the Peace of Counties and of Clerks of County Councils, the Society of Town Clerks, and the Society of Clerks of Urban District Councils have recently approved a *pro forma* for use when making such inquiries and these forms are printed, by the authority of the Law Society, by most firms of law stationers. The value of using these forms lies in the fact of their acceptance by the professional societies above mentioned, for local officials cannot be compelled to answer questions of this nature by post. The form includes certain queries, such as to byelaws under the Petroleum (Consolidation) Act, 1928, which may be relevant to a particular parcel of land, but in other respects it is submitted that the form does not provide sufficient information for the careful purchaser. It is suggested that practitioners should endeavour to obtain as definite information as possible on all the relevant matters discussed above.

(5) Registered Land

The position with regard to land charges (including local land charges) in the case of registered land under L.R.A. has already been discussed. It remains to point out that non-registrable charges (paragraphs (2) and (4) above) do not come within the definition of overriding interests in L.R.A. (section 70 (1)). The provisions of the Act are very widely drawn (see, *e.g.*, section 5), but following the principle of *Lewisham Borough Council* v. *Maloney* (*supra*), it could hardly be successfully argued that a purchaser from a registered proprietor should take free from such statutory charges on the grounds that they were not entered on the register. The need for inquiries applies therefore with equal force in the case of registered land.

(6) Conclusion

It is now important to consider the steps which practitioners should take in order to protect their clients against the above-mentioned statutory charges. It is suggested that if the following precautions are invariably taken *before* contract, all reasonable care will have been taken, and if some charge appears after a binding contract has been concluded between the parties, and this has not been previously disclosed, the purchaser may safely rely on his normal equitable remedies of rescission or an abatement in the purchase price.

(a) Search in the land charges register against all persons who are known to have held an estate in the land since 1925. If an abstract has been delivered, it will not be necessary to search against persons in respect of whom clear certificates of search are abstracted. In the case of registered land, authority should be obtained from the vendor to inspect the charges register of the title concerned.

(b) Search in all parts of the local land charges register of the district or county borough council, and also, where relevant, in that of the county council.

(c) Inquire of the district or county borough council whether any compulsory purchase order or order under section 14 of the Water Act, 1945, has been made affecting the property; whether the property has been requisitioned under emergency powers; whether a maximum rent has been registered in respect of the property under the Furnished

Houses (Rent Control) Act, 1946; whether the premises were registered as decontrolled (before 1939) under the Rent and Mortgage Interest Restriction Acts; and whether any outstanding notices or orders have been served or made affecting the property (not all these are registrable as local land charges, see above, paragraph (4), and sections 65 and 107 of the Public Health Act, 1936).

(d) Inquire of the county council (except in the case of land situate in a county borough) whether any outstanding notices or orders have been served or made affecting the property.

(e) After the Town and Country Planning Bill, 1947, has come into force, inspect the register maintained by the local planning authority under clause 13 (5) thereof, as to what applications for development permission has been made and how these have been dealt with (*supra*, paragraph (2)), and inquire of the authority whether an enforcement notice or any order under clauses 24–31 of the Bill has been made in respect of the property. It would also be advisable to inspect the development plan, so as to ascertain whether the purchaser's wishes regarding the property would be likely to conflict with the declared intentions of the planning authority. Such inspection would also disclose whether any part of the property had been designated as being subject to compulsory purchase.

(f) The usual preliminary inquiries should be made of the vendor, and these should include the following clauses:—

(i) Have any government war works been executed on the land, has the land been damaged by government war use, or has the land been requisitioned for such use, within the meaning given to these terms by the Requisitioned Land and War Works Act, 1945?

(ii) Is the property, or any part thereof, the subject of any compulsory purchase order, or has it been designated by any statutory or other authority as being subject to compulsory purchase?

(iii) Is the property, or any part thereof, subject to any land improvement or other statutory charge of any kind? Has the vendor or his agent notice or knowledge of any fact which will, or may, subject the property, or any part thereof, or the owner or occupier thereof, to some charge or liability or obligation at some future time? (cf. *Williams on Vendor and Purchaser*, 4th ed., Appendix D, at p. 1263).

(iv) Has development been carried out on the property since the Town and Country Planning Act, 1947, came into force? If so, evidence of satisfaction in full of all development charges payable in respect thereof must be produced on completion.

Unfortunately the above searches and inquiries will not suffice the purchaser if he proceeds to completion; the above procedure should be repeated *in extenso* immediately prior to completion (*s*), but in the present state of the law, there is, it is submitted, every justification for taking what may at first sight appear to be excessive caution (*t*).

(*s*) See note (*l*), *supra*.

(*t*) A similar view was expressed by the learned Editors of this Journal nearly ten years ago when landowners enjoyed a greater measure of freedom than they do at the present time (see Vol. 2, p. 290).

NOTE ON MEMORANDA OF ASSENTS ENDORSED ON REVOKED GRANTS.

By D. C. Sealy-Jones.

Under section 36 (5) of the Administration of Estates Act, 1925, a person in whose favour an assent or conveyance of a legal estate is made may require that notice of the assent or conveyance be written or endorsed on or permanently annexed to the probate or letters of administration and is entitled to demand production of the grant to prove that the notice has been placed thereon. By sub-section (7) an assent or conveyance in respect of a legal estate shall, in favour of a purchaser, be taken as sufficient evidence that the person in whose favour the same is made is the person entitled to have the legal estate conveyed to him, unless notice of a previous assent or conveyance has been placed on or annexed to the probate or administration. The importance of inspecting the grant of representation, if after 1925, when purchasing land from a personal representative or a person deriving title under him for the purpose of ascertaining that no previous assent or conveyance has been noted thereon is well known and such inspection is everyday practice. There are, however, numerous circumstances in which a grant of representation may be revoked, and when this occurs the grant must be returned into the Probate Registry, although it is more usual for it to be brought in, either voluntarily or on citation, immediately proceedings for revocation are commenced. The new grant, when issued, does not, of course, have endorsed thereon any memoranda of assents or conveyances which may have been endorsed on the revoked grant, and the question arises whether a person who is asked to accept a title made under the second grant can inspect the revoked grant. There appears to be no authority in the Probate Court Rules or otherwise. It is the practice, presumably settled by an internal direction of the Probate Registry, not to issue further copies once a grant has been revoked, and it is understood that while the right of the general public to inspect the grant itself is not admitted, no objection would be raised in the case of a person having reasonable cause. The point does not appear yet to have arisen in practice since proceedings for revocation are usually commenced before administration has proceeded very far; still, the possibility of the recurrence of such cases as *Carter* v. *Carter* (1857), 3 K. & J. 617, and *Re West*, [1909] 2 Ch. 180, in both of which revocation was many years after the issue of the grant, cannot be discounted. It might be suggested that the words of section 36 (5): " . . . may require . . . that the probate or letters of administration be produced . . . to prove that the notice has been placed thereon or annexed thereto ", confer an absolute right to production irrespective of whether the grant is in the custody of the personal representative or has been returned into the registry. It is probable, however, that this is a right as against the personal representative alone and not against the Court. Further, the right is only that of the " person in whose favour the assent or conveyance of a legal estate is made ", and as the cost of production is thrown on the estate of the deceased it is doubtful if there is the

right to more than one such production. It is, of course, the practice for purchasers to be required to pay the costs of production of grants forming part of the title and not in the possession of their vendor or his mortgagee. It is to be regretted that the right to the production of a revoked grant is not founded on a more substantial footing, if in fact such a right exists.

Perhaps a more serious difficulty flows from the form of the second grant. It is not apparently the practice of the Probate Registry to note on the grant that there has been a previous grant which has been revoked. Unless, therefore, the previous grant is abstracted a purchaser under the second grant may take his conveyance in ignorance of its existence. Section 37 of the Administration of Estates Act, 1925, provides that all conveyances of any interest in any real or personal estate made to a purchaser by a person to whom probate or letters of administration have been granted are valid notwithstanding any subsequent revocation of the grant. Assuming such a conveyance has passed the legal estate a purchaser acquiring the same would appear to have a better title than a purchaser under a second grant notwithstanding revocation of the prior grant and suppression thereof by the new legal personal representative. A purchaser is bound to accept an abstract which appears on its face complete, and it would seem that the present is a case for the operation of section 183 of the Law of Property Act, 1925. A case came the writer's way not long ago where the first grant had been to the Treasury Solicitor on behalf of the Crown. This was revoked and a new grant made to the next-of-kin. The Treasury Solicitor, in his capacity as administrator, had paid off a mortgage debt upon which the deceased was liable as guarantor. The statutory receipt indicated the person paying off the mortgage, but contained the words necessary to negative a transfer. The revoked grant forms part of the mortgagor's title, and from the circumstances of the case could hardly be suppressed.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY CASES*

Contract for sale—binding contracts without exchange.—Eccles v. *Bryant,* [1947] 2 All E. R. 63, raised a point that was unexpectedly novel, namely, whether a contract for the sale of land intended to be completed in the normal way could be a valid contract before exchange. The circumstances of the case were unusual, because after pressure to exchange contracts exerted by the defendant's solicitors, the plaintiff's solicitors eventually sent the contract by letter to the defendant's solicitors after a telephone conversation and without any precise agreement for exchange. The letter from the plaintiff's solicitors was crossed by a letter from the defendant's solicitors which called off the sale. Vaisey, J., held as follows: " The question here, as in all the cases cited, is not whether the contract

was signed and exchanged in the usual or any other way, but whether, having been signed, it became by exchange or otherwise binding as a contract between the parties. The circumstances of the case are unusual, but, on the whole, I think that it did become binding when the plaintiff in response to the defendant's invitation, put his signed part of the contract into the post on the afternoon of June 18, 1946."

The essential point of this decision, which distinguished some of the cases on "subject to contract" (see 7 Conv. p. 137), is that a contract becomes binding where it is intended to become binding—provided, of course, that any necessary formalities, such as writing, have been completed. A deed requires delivery, as well as signing and sealing, but there is no equivalent ceremony essential to a contract. This rule is no doubt good sense, but advice is not always easy to give.

Contract for sale—"provisional" agreement—Branca v. *Cobarro,* [1947] 2 All E. R. 101, emphasises the point made in our last note. Here an agreement to sell the lease of a farm included payment of a deposit of £500, payment of £2,500 three days later and the balance of £2,000 within six months. The terms also included one that if the purchaser did not fulfil the agreement he was not to be entitled to recover the £3,000. Another clause provided as follows: "This is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed". The Court of Appeal held that this clause made the agreement a binding contract and that the purchaser could not recover the £500 which he had paid as a deposit.

At first instance Denning, J., had held that the word "provisional" meant "tentative" and so the contract was not binding. The word "provisional" was mitigated to some extent by the word "until" and as explained therewith merely implied that the written document was to be superseded by a more formal one. There seems to be no method of persuading parties to realise that either they must make a contract or leave it to their lawyers to do so. There is no true halfway house.

Requisitioned land—no necessity for registration as a land charge—what is an easement right or privilege.—The importance of *Lewisham Boro. Council* v. *Maloney,* [1947] 2 All E. R. 36, extends considerably beyond the actual decision. The Court of Appeal held that a purchaser was bound by a requisition made under Reg. 51 of the Defence Regulations notwithstanding that at the time of the sale the property was standing empty and the requisition had not been registered as a land charge under the Land Charges Act, s. 10 (1) (Class D (iii)) as an "easement right or privilege" within that class. It will be observed that the purchaser could have had no notice of this requisition by inspection and it was precisely against this type of incumbrance that the Land Charges Act was designed to protect a purchaser, but this view did not appeal to the Court of Appeal as the right would not normally be exercised so as to leave a purchaser without notice. The decision of the Court, which was unanimous, was based on the meaning of the words "easement right or privilege" and it was held that the words "right or privilege" were restricted by the context "easement". Exactly how far they were so restricted the Court was careful to avoid deciding—the judgment is limited to excluding from the meaning of the words "such statutory rights of possession and user of the land as are conferred by reg. 51". The Court also pointed out that in

any case even if the requisition were void a new requisition could be made forthwith.

With the increase of statutory restrictions on user and enjoyment and the rapidly increasing powers of government departments to interfere with land this may prove an important decision.

Settlement—after-acquired property clause—vested interest not falling into possession.—The difficulty of making after-acquired property clauses fit the type of property intended to be caught, no more and no less, is illustrated by the peculiar result in *Re Benett-Stanford Sett. Trusts,* [1947] 1 All E. R. 888. A marriage settlement contained the usual after-acquired property clause. The trusts of the settlement followed the usual pattern in which the wife took a life interest followed by a gift over in default of appointment in favour of children attaining twenty-one and subject thereto to the wife absolutely. The only child of the marriage attained twenty-one and died in the lifetime of his mother having by his will bequeathed all his property to his mother. Therefore under her son's will she took an interest in expectancy on her death without other issue of the marriage. Under the after-acquired property clause any property caught by it was to be held upon the trusts declared by the settlement " or as near thereto as circumstances will permit ". The interest of the son had vested on his attaining twenty-one for an absolute interest subject to divesting by the power of appointment if any object existed who could benefit. In the events which happened there was no such object. Consequently the son's interest passed to his mother and was after-acquired property within the meaning of the clause in the settlement. Hence the mother had to bring it into settlement once again. Obviously this presented difficulties and three possible solutions were offered: (i) the mother and her husband took their life interests under the settlement and then the absolute interest revested in the son; (ii) the mother and her husband took their life interests but the Court could frame trusts under the words " or as near thereto as circumstances will permit " which would exclude the son; (iii) the effect of the after-acquired property clause and the will of the son was to produce an intestacy in respect of the son's reversion. Jenkins, J., held that the effect was to confer a life interest on the mother and her husband under the settlement and then, there being no further issue, upon the mother absolutely, apparently on the principle of *Lassence* v. *Tierney,* 1 Mac. & G. 551, applied to the interest which would revert back to the son's estate after the life estate. It would constitute an absolute interest followed by a trust (constituted by the after-acquired property clause) not exhausting the whole beneficial interest and consequently the original absolute gift to the mother would remain. This is certainly an ingenious solution.

The learned Judge declined to allow that the death of the son was a circumstance that did not permit of the interest vested in him being settled on precisely the original trusts of the settlement. This amounts to deciding that the " circumstances " (within the meaning of the clause) must be impossible—or so it would seem. In *Re Shelton,* [1945] Ch. 158 (distinguished in the instant case) the circumstances involved a base fee, and this cannot be created except by incomplete barring of the entail, and the words " as nearly corresponding thereto as the circumstances will admit " were used to maintain the trusts.

It is, of course, possible to bar an after-acquired property clause from being operative in like cases by some words excluding any interest which may become vested directly or indirectly in the trust fund the subject of

the settlement. It is doubtful whether circumstances applying it are sufficiently frequent, but with enhanced death duties and similar problems it may be worth while.

New Towns Act—duty of Minister in considering objections.—The unanimous decision of the House of Lords in *Franklin* v. *Minister of Town and Country Planning,* [1947] 2 All E. R. 289, seems to leave little room for appeal to Courts of law against Ministerial decisions to create new towns under the New Towns Act. Lord Thankerton (at p. 295) in delivering the only speech, said: "In my opinion, no judicial, or quasi-judicial, duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case. The respondent's duties under section 1 of the Act and Schedule I thereto are, in my opinion, purely administrative, but the Act prescribes certain methods of, or steps in, the discharge of that duty". Unless, therefore, it could be shown that these steps were not observed no ground of appeal lay to the courts. As the learned Law Lord put it a little later when referring to "bias": "in the present case, the respondent having no judicial duty, the only question is what the respondent did, *i.e.* whether, in fact, he did genuinely consider the report and the objections". It was held that there was no evidence that the Minister had a closed mind and did not genuinely consider the report of the inquiry and the objections, notwithstanding his attitude prior to the passing of the Act.

In view of the somewhat analogous provisions in other planning legislation this decision is likely to prove of the first importance and it is, therefore, peculiarly significant that there was only one opinion expressed. In effect it would seem that for all practical purposes these Ministerial decisions, notwithstanding that they operate by way of interference with property rights, are removed from the sphere of law to the sphere of politics. So far as the lawyer is concerned he must observe only that the precise requirements of the Act are observed, but he has no method of determining on what principle, if any, a decision may be swayed one way or the other.

Town and Country Planning Act, 1944—*redevelopment of war-damaged land.*—*Robinson* v. *Minister of Town and Country Planning,* [1947] 1 All E. R. 851, is another case illustrating the trend of modern legislation in removing planning outside the province of the law courts and incidentally disapproves *Phœnix Assce.* v. *Minister of Town and Country Planning,* [1947] 1 All E. R. 454 (noted *ante,* Vol. 11, p. 282). This case arose out of a compulsory purchase order made in respect of premises in Plymouth, some of which were not destroyed, and the order could be made only if the Minister was "satisfied that it is requisite" for dealing with the damaged property generally. The Court of Appeal held that in making the determination the Minister was not acting in any judicial or quasi-judicial capacity. So far as the public inquiry was concerned he was so bound, but the actual decision was not judicial but executive, and consequently whether or not there was sufficient evidence to "satisfy" him was irrelevant. It is true that Somervell, L.J., suggested (at p. 862) that the Minister could not consider representations from a local council after the inquiry was closed (following *Errington* v. *Minister of Health,* [1935] 1 K. B. 249), but even here the learned Lord Justice suggested that the principle should not apply. It is submitted with respect that an administrative decision of this character must either be treated as subject to the control of the Court under the

principle of "natural justice" or completely outside it so long as any statutory requirements are fulfilled. There is no doubt that more will be heard of this matter, but it is felt that fighting Ministers on these administrative questions is going to be too expensive for the private individual. The prospect of success is small.

A similar attitude of the Court is to be found in *Taylor* v. *Brighton Corpn.*, [1947] 1 All E. R. 864, when it held that a prohibition in a town planning scheme against use as a fun fair without consent of the planning authority was valid. The only question that the Court could decide was whether the insertion of such a provision contravened the Act or the general law, and having found that it did not, the Court was not concerned with whether it was "necessary or expedient" for prohibiting or regulating the development of land. Actually the provisions of the 1943 Act are very wide and the Court seems to have thought that very few restrictions could be put upon the form of the planned development which the Minister decided to employ even though it might give rise to some inconvenience in compensation (as here where it was uncertain whether or not a fun fair would be allowed) and to some hardship from lack of right of appeal which also occurred in this case.

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2. *CHARITIES*

Anti-vivisection—not a charity—trusts beneficial to the community.—*National Anti-Vivisection Society* v. *I. R. C.*, [1947] 2 All E. R. 217, is one of the most important decisions on charity of recent years and this at a time of a number of significant decisions. In *Re Foveaux*, [1895] 2 Ch. 501, Chitty, J., had held that the society as then constituted was a charity. The House of Lords (Lord Porter dissenting) have now held that the society is not a charity. The significance of the decision lies in the grounds that were offered for it. First, the society was held not to be wholly charitable because it was political, and it was political because it sought to alter the law. One of the aims of the society was the repeal of the Cruelty to Animals Act, 1876, or such part of it as permitted vivisection and "the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed": *Tyssen on Charitable Bequests*, p. 232, cited per Lord Wright and per Lord Simonds. Actually this is a difficult saying. In *Bonar Law Memorial College* v. *I. R. C.*, 49 T. L. R. 220, an educational trust was held not charitable because it was party political. If any law reform is also political then there seems some doubt whether some of the purposes for which universities have existed may not be political and hence non-charitable. With respect, we think that this view of what constitutes a political object may require reconsideration. It must be borne in mind that in the instant case the purposes were not either religious, educational or for the relief of the poor, but we do not know of any ground for suggesting that a political object destroys the "wholly charitable" nature of any trust even if primarily it is religious or for the relief of the poor. This may be illustrated from *I. R. C.* v. *Temperance Council of Christian Churches*, 136 L. T. 27, cited by Lord Wright (at p. 225), although he there suggests that the political object was a primary purpose. It is vital to bear in mind that political in this respect has nothing necessarily to do with party politics.

Secondly, and even more importantly, where a trust is sought to be declared as charitable because it is "for the public benefit", the question of "public benefit" is to be determined by the Court on the evidence before

it. It is not a question to be determined by the settlor (approving *Re Hummeltenberg,* [1923] 1 Ch. 237, where a gift for a college for training spiritualistic mediums was held not charitable), nor is it a question for the Judge's own opinion, nor for general popular approval, but the evidence before the Court on that occasion. Hence what has been held charitable before may be shown to be non-charitable in the light of existing evidence. Where the evidence shows advantages and disadvantages it would seem that the Court must weigh them in the balance and decide on the evidence. If knowledge changes then the funds of an established charity should be applied *cy-près* and it may even be the duty of the Attorney-General to intervene to that end: *per* Lord Simonds, at p. 238.

It must be borne in mind that once a settlor has established that the trust is for the benefit of the public it is not necessarily charitable: *Williams* v. *I. R. C.,* [1947] 1 All E. R. 513 (*ante,* Vol. 11, p. 283), but the settlor must also establish that it falls within the spirit of the old statute of Elizabeth. In truth, the drafting of any but the most straightforward trusts is not easy. It is wisest to adopt a clause that the fund shall be applied so far as it can lawfully be applied as a charitable purpose.

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3. *WILL CASES*

By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn, Barrister-at-Law

Fraud upon a power.—Re Crawshay (*No.* 2) (1947), 63 T. L. R. 260, is an interesting case on what constitutes a fraud upon a power.

By his will the testator, who died in 1879, settled a sum of £100,000 on usual trusts for the benefit of his daughter Rose for life and after her death for the benefit of her children. He then declared that should there be no child of Rose who attained twenty-one, the fund should be held on such trusts for the benefit of Rose's nephews and nieces living at her death as she should by will appoint, and in default of appointment on trust for all such nephews and nieces equally. By a codicil to his will the testator recited that his daughter Rose was engaged to be married to a Mr. Williams and that he disapproved of such marriage. He then declared that none of Rose's children by the said Mr. Williams should take any share in the fund, but that the will should be read as if all such children had been expressly excluded from all benefit therein.

Rose married Mr. Williams and had two children who attained twenty-one. It appeared that the testator was reconciled to her marriage before he died; but his forgiveness did not extend to revoking the codicil.

As the learned reader will perceive, the construction of the will was doubtful. The gift over to the nephews and nieces was, according to the literal wording of the will, only to take effect in the event of Rose having no children who attained twenty-one, and she had two such children. If the gift over did not take effect the fund would fall into residue on Rose's death. The question of construction was settled in favour of the gift over taking effect when Vaisey, J., decided *Re Crawshay* (*No.* 1), [1946] Ch. 711, noted *ante,* Vol. 11, p. 117.

By her will Rose appointed the whole of the funds to her nephew Jack Crawshay, the son of one of her brothers. If that appointment took effect the funds would go to Jack, but if it was invalid as a fraud upon the power, the funds were divisible between him and three other nephews and nieces.

Rose naturally felt considerable resentment against the codicil to her father's will which excluded her children from any benefit under the will. This resentment was shared by the other members of her family. In 1887

her three brothers, who were the residuary legatees under her father's will, assigned to the trustees thereof all their expectant shares in the settled legacy on trusts for the benefit of Rose's children. But this deed never took effect because, in the event, Vaisey, J., decided that on Rose's death the settled legacy did not fall into residue but that the gift over took effect.

In 1907 conveyancing counsel advised that if Rose made an appointment in favour of Jack Crawshay, the youngest of her nephews, and if Jack Crawshay assigned his interest thereunder to the trustees of the testator's will, the appointment would not be invalid as a fraud upon the power in the absence of any antecedent bargain between Rose and Jack, so that the family object of benefiting Rose's children would be attained, even if the deed of 1887 failed to take effect. Accordingly, by a series of testamentary instruments beginning with a codicil in May, 1907, and ending with her last will in June, 1934, Rose appointed the whole of the settled funds to Jack; and Jack, at the age of twenty-five, in pursuance of a clause in his father's will which put him to his election, in 1919 purported to assign to the trustees of the deed of 1887 all the share or interest whether vested or contingent to which he was or might become entitled in the settled legacy on the trusts of the deed of 1887—that is, on trusts for the benefit of Rose's children. In fact, this deed did not effectively assign Jack's interest under the appointment by Rose, because such interest was a mere expectancy: *Re Brooks,* [1939] Ch. 993. On the other hand, it did effectively assign Jack's one-fourth interest in default of appointment. The odd result was that Rose could have made her children's position more secure by not exercising the power of appointment at all.

Jack swore that he did not have any discussions with Rose or her solicitors either before or after he executed the deed of 1919 with regard to the execution thereof. But Vaisey, J., held that his memory must have been at fault, because there was in existence a revealing letter from Rose to Jack (then aged fifteen) in which she explained what was being done for the benefit of "the rightful inheritors", *i.e.,* her own children. Vaisey, J., accordingly held, following *Re Wright,* [1920] 1 Ch. 108, and the well-known dictum of Lord Parker in *Vatcher* v. *Paull,* [1915] A. C. 372, that the appointment was a fraud upon the power. From first to last Rose was thinking not of her nephews and nieces but of her own children. She regarded the funds as though they were her own property and nothing was further from her thoughts or wishes than that any nephew or niece of hers should take any benefit under the appointment. The case fell exactly within Lord Parker's statement that "the term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power had been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating a power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid". It made no difference that the intention to benefit non-objects failed in its purpose because the deed of 1919, being a voluntary assignment of a mere expectancy, failed to pass Jack's interest under the appointment. In this case the peculiar feature was that the persons sought to be benefited were not merely non-objects of the power, but also deliberately excluded by the donor from all participation in his bounty.

So the long struggle against the codicil of 1877 ended in defeat; and

the dead hand of the mid-Victorian testator prevailed against the magnanimity of Rose's brothers and the skill of her conveyancing counsel, and deprived her children of what she called " their just inheritance ".

It is a curious coincidence that this is the second reported contribution of the Crawshay family to the law on what constitutes a fraud upon a power; the first was *Re Crawshay* (1890), 43 Ch. D. 615, in which the appointee was the testator in the instant case. This case was distinguished from the case noted and treated as not a satisfactory decision (see at p. 263). Attention should also be drawn to *Re Nicholson,* [1940] Ch. 11 (noted *ante,* Vol. 3, p. 90), which is distinguishable from the instant case because in that case no power of selection between objects of the power was exercised.

(1 K. & E. 94.)

J. H. C. M.

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4. *FAMILY LAW CASES*

By R. H. GRAVESON, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law

Divorce—husband's petition on wife's cruelty—whether wife's sexual relations with other women constitute cruelty—husband's knowledge before marriage—Gardner v. *Gardner,* [1947] 1 All E. R. 630.—Lord Lindley's definition of cruelty for purposes of divorce and judicial separation (*Russell* v. *Russell* (1895), 64 L. J. P. 105) as conduct of such a character as to have caused danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger, was applied to unusual circumstances by Hodson, J., in this case. The major point of interest for practitioners is the additional instance of cruelty which the case provides. Throughout the period of marriage, which began in 1938, the wife was addicted to unnatural sexual relations with other women. The husband made persistent efforts to break off these associations of his wife, but he did not succeed and in consequence suffered considerably in health. On these facts Hodson, J., granted a decree *nisi* on the ground of cruelty, being satisfied that " . . . the husband has proved a course of conduct consisting of wilful and unjustifiable acts on the part of the wife directed towards him, which not only did injury to his health, but also caused reasonable apprehension of the same " (at p. 633). The husband's case did not appear to have been prejudiced in any way by his knowledge of his wife's sexual perversion before the marriage.

(Latey 73–75.)

Divorce—husband's petition on desertion—wife a feeble-minded person during part of the period of alleged desertion—whether wife capable of continuing intention to desert—Brown v. *Brown* (*otherwise Grayson*) (*by her guardian*), [1947] 2 All E. R. 160.—The judgment of Lord Merriman, P., in this case is notable for a careful discrimination for the purposes of intention to desert between the four classes of mental defectives under the Mental Deficiency Acts, 1913–1927, *i.e.* (in a descending order of mental deficiency), idiots, imbeciles, feeble-minded persons and moral defectives.

The wife's desertion began in March, 1938, and later in that year, after a conviction for larceny, an order was made on the ground that she was a

feeble-minded person, on which she was committed to an institution. About the end of 1940 she was released on licence and lived thereafter with her mother in Leeds. Since the date of her release she made no attempt to see her husband, who was living in the same city. The learned President considered inapplicable the judgment of the Court of Appeal in *Williams* v. *Williams* ((1939), 108 L. J. P. 140) that persons of unsound mind are incapable of forming any intention: in his words: "I can see no reason whatever for importing that reasoning into a case like this where the person is not of unsound mind but is merely a mental defective and in the third category of such persons" (at p. 162). It was held accordingly that the wife's intention to desert, first conceived in 1938, continued throughout the period of her feeble-mindedness, and a decree of divorce was pronounced in favour of the husband.

Although from the report the point does not appear to have been raised, the wife was probably feeble-minded at the time she formed the intention to desert, which took place less than a year before her committal to an institution. In view of the reasoning of the Court, it is submitted that even if this were so, it would not have affected the decision.

(Latey 177.)

Divorce—insanity—Matrimonial Causes Act, 1937, *ss.* 2 (*d*) *and* 3 (*a*) *and* (*b*)—*Whitley* v. *Whitley,* [1947] 1 All E. R. 667.—Barnard, J.'s, decision at first instance, noted Vol. 11, pp. 219, 220, has now been affirmed on other grounds by the Court of Appeal. The Court found that the safeguards, such as signed statements by a visiting committee as to the propriety of the continued detention of a patient, had not been complied with ". . . and, therefore, . . . the husband has not made out that the wife was detained in pursuance of an order under the Lunacy and Mental Treatment Acts, 1890–1930." (p. 669). On the face of it this appears to be a *non sequitur,* since the making of an order under the Acts must necessarily precede visits by a committee. But the substantive point, which was brought out in *Murray* v. *Murray,* [1940] 4 All E. R. 250, is that the continued detention of a patient, under an order properly made, becomes unlawful upon failure to carry out the subsequent requirements. The Court of Appeal did not consider it necessary to decide whether a temporary patient lawfully detained under the Act of 1930, and in respect of whom all the provisions of the Act had been properly carried out, could be held to be detained under an order.

(Latey 79.)

Nullity of marriage—sterilisation of husband before marriage—wife's knowledge not a bar to decree—J. (*otherwise S.*) v. *J.,* [1947] 2 All E. R. 43.—The decision of Jones, J., noted Vol. 11, pp. 222–223, has now been reversed by the Court of Appeal. It may be recalled that this case involved a wife's petition for nullity on the ground that the husband before marriage had rendered himself permanently sterile, a fact of which his prospective wife was then aware. Whereas Jones, J., had held that this act amounted to wilful refusal on the part of the husband to consummate the marriage, in the opinion of the Court of Appeal: "We do not think the question of wilful refusal to consummate the marriage arises", and classified the ground of complaint as one of impotence. In the second place, the Court of Appeal took a different view from that of the Court below on the question of the wife's sincerity, approving a *dictum* of Langton, J., in *Nash* v. *Nash*

(1940), 109 L. J. P. 60, that the petitioner's knowledge of impotence before marriage is not an absolute bar in law. As the Court was of opinion that the wife had justified her delay in bringing proceedings and, more especially, her marriage with knowledge of this defect, her appeal was allowed.

(Latey 170, 171, 174.)

Security for wife's costs—application by unsuccessful husband petitioner for new trial of divorce petition—relevance of fresh evidence on question of ordering security—Brightstein v. *Brightstein,* [1947] 2 All E. R. 121.—Three points of interest arise in this decision of the Court of Appeal on the motions of a successful respondent wife for security for her costs of a new trial of the divorce petition, for which her husband was applying, and for a stay of his application pending payment by him of the costs of the original hearing. (1) The Court considered inadequate the bare statement of the wife's belief that the husband was in a certain employment and earning " a good salary ", and that she herself received a salary of £4 a week. (2) The Court admitted as evidence allegations in affidavits by the husband, on which he based his application for a new trial, of the wife's adultery, between the date of service of the petition and the date of the original hearing and decree *nisi,* with two men other than the named co-respondent. Counsel for the wife did not take the opportunity granted by the Court to contest these allegations, preferring to rely on their inadmissibility as evidence in the application. But the statements were held admissible, and security for costs refused. The Court relied on its previous decision in *King* v. *King* (1943), 112 L. J. P. 89, and cases there followed, and affirmed that the appropriate circumstances in which security for costs should be ordered were left completely at large. There was *prima facie* evidence that the wife, living in adultery, had forfeited the right to pledge her husband's credit. In the words of Tucker, L.J.: " I think that this Court is entitled and bound to look at such evidence, and, having looked at it, if we consider it renders the case inappropriate to the granting of this relief, to act accordingly " (at p. 124). (3) The application to stay the appeal until payment of the costs of the first hearing was also destined to fail, despite the authority of *Waite* v. *Waite and Muir,* (1916), 32 T. L. R. 432, where a Divisional Court of the Divorce Division refused an application for the re-hearing of a divorce petition until the costs of the first hearing had been paid. Instead of overruling the decision of an inferior Court with which it disagreed, the Court of Appeal, per Tucker, L.J. (at p. 122), thought that the two cases could be distinguished on the grounds (a) " that the Divisional Court of the Divorce Division was there applying its own practice, whereas we are dealing with an appeal to the Court of Appeal ", and (b) " It was an application in the Divorce Division for a re-hearing, not an appeal to this court asking for an order for a new trial ". In view of the functions of the Court of Appeal and the policy of the Judicature Acts, 1873–5, it is not easy to appreciate these distinctions. Purely on the merits one would have expected an order that an unsuccessful petitioner, who had deliberately refused to pay the taxed costs of a first hearing, should pay those costs as a condition precedent to involving the respondent in further liability in the same cause. This is particularly so as the Court of Appeal, in deciding this point, did not rest on the evidence of the wife's adultery, an independent issue dealt with later in the judgment.

(Latey, 256–7, 646.)

Custody of legitimated child—no formal declaration of legitimacy—C. v. C., [1947] 2 All E. R. 50.—This important decision of a Divisional Court of the Divorce Division (Lord Merriman, P., and Jones, J.) "upsetting the practice of this Division in regard to legitimated children which has prevailed for nearly twenty years" (p. 53) arose from the following facts. An illegitimate child, born in 1944, was legitimated in 1946 by the marriage of her parents (section 1 (1), Legitimacy Act, 1926), but no steps had been taken either under that Act or the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188, for a declaration of the child's legitimacy. In 1946, on the wife's complaint of the husband's desertion and wilful neglect to maintain and her request for custody of the child, the justices made an order accordingly. The husband appealed against the order for custody on the ground that the justices had no jurisdiction to make it. That was the only question in issue, and it involved two points of importance. The first point was whether the Court should follow *Bednall* v. *Bednall* (1927), 96 L. J. P. 150, *Green* v. *Green* (1929), 98 L. J. P. 58, and *Jones* v. *Jones* (1929), 98 L. J. P. 74, in which it was held that the Divorce Court had no jurisdiction under section 193 of the Judicature Act, 1925, to make an order for the custody of a legitimated child as being "a child, the marriage of whose parents is the subject of the proceedings", unless a declaration of legitimacy under the Legitimacy Act, 1926, had first been obtained. The same limitation would affect the jurisdiction of magistrates under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. The Court considered these cases wrongly decided, preferring to follow Denning, J.'s, judgment in *M.* v. *M.* (1945), 115 L. J. P. 29, on the ground that, ". . . it is the subsequent marriage of his parents which renders the child legitimate by virtue of the Legitimacy Act, 1926, and it is that same marriage of those parents which is the subject of the proceedings in which the custody order is sought to be made" (at p. 53). The Court held accordingly that jurisdiction existed under section 193 of the Judicature Act, 1925, whether or not a declaration of the child's legitimacy had been obtained under section 188 of that Act.

The second point, independent of the first, was whether a legitimated child could be considered to be "a child of the marriage" within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts. Farwell, J., had dealt with the point in *Re Wicks' Marriage Settlement* (1940), 109 L. J. Ch. 163, holding that a legitimated child could not be a child of the marriage for the plain reason that ". . . he is a legitimate child of the spouses, but he is not a child of the marriage because in fact he was born before his parents were married". The learned President, however, remarking that "Parliament can alter the status of a child" (at p. 54), continued in words which cut at the very roots of the distinction between legitimacy and legitimation. He said: "When, therefore, in section 1 of the Legitimacy Act, 1926, Parliament enacts that in the case of a living illegitimate person whose parents marry or have married one another . . . the marriage shall render that person legitimate . . . , it is difficult to see why, by the same process, that person is not also 'rendered' a child born in lawful wedlock, or a child of the marriage". This attempted assimilation of the status of a legitimate and a legitimated child would be a most desirable reform; but it is at least doubtful whether it can be achieved by disregarding the discrimination made by over a century of precedent and still of some importance today in the law of succession to hereditary titles and land devolving therewith. It is a distinction sanctified by the House of Lords in *Birtwhistle* v. *Vardill* (1840), 7 Cl. & F. 895, and followed by the Chancery Division and the Court of Appeal in a number of subsequent cases. The *dictum* of James, L.J., in *Re Goodman's Trusts* (1881), 50 L. J. Ch. (C. A.) 425, at 443, may be taken as repre-

sentative; for he remarked, "English heirship required not only that the man should be legitimate, but . . . born legitimate within the narrowest pale of English legitimacy". Further, the limitations on, and saving provisions in favour of, legitimated persons succeeding to property and titles as heir, *e.g.*, in entailed interests, contained in the Legitimacy Act itself, constitute an obstacle not easily overcome in this identification of all types of "legitimate" persons. For the limited purpose of the decision noted, at least, a legitimated child is a legitimate child, a child of the marriage and a child born in lawful wedlock, and magistrates have jurisdiction to treat him as such.

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5. *INCOME TAX*

By LEONARD STEIN, Barrister-at-Law

Surtax—voluntary settlement—rectification.—Van der Linde v. *Van der Linde* (1947), Taxation Reports 201, was a case in which rectification of a deed of covenant was unsuccessfully sought by the covenantor on the ground that the deed failed to give effect to his intention. The covenantor had been in the habit of making voluntary payments to a relative. He had been advised that by executing a deed of covenant he could obtain some advantage for himself in the matter of taxation. The result was the execution of a deed containing a covenant for an annual payment of £400. The covenantor now asked that the deed be rectified to provide for the payment of such an annual sum as would after deduction of tax leave £400. This, he said, was his intention, and it was merely by a slip that it had not been carried into effect. Evershed, J., took the view that, on the evidence, the covenantor had failed *in limine* to prove that he had, in fact, intended to covenant for the payment of a net sum; he had some rather vague idea of obtaining an income tax advantage but no clear comprehension of the technicalities of the matter. In refusing rectification, the learned Judge emphasised the discretionary nature of the jurisdiction to rectify a deed and the caution with which it should be exercised, especially in the case of a voluntary settlement, as opposed to a contract *inter partes*. He did not, however, go as far as he was invited to go by counsel for the Crown, who contended that there was no equity to rectify a voluntary settlement such as that under consideration, since this would involve either adding to an already perfect gift or else perfecting an imperfect gift contrary to the principles recently propounded in *Re Fry*, [1946] 1 Ch. 312. On this point the learned Judge refrained from expressing a concluded opinion, observing that he was not satisfied that authorities relied upon by the Crown were of themselves an insurmountable bar to the rectification of a voluntary settlement.

Income tax judgment debt including award of interest—deduction of tax.—The decision of the Court of Appeal in *Westminster Bank* v. *Riches* (see note in *The Conveyancer*, December, 1945, at p. 114) has now been affirmed by the House of Lords.

Surtax—interconnected companies—all incorporated outside United Kingdom—Finance Act, 1938, *ss.* 38 (3), 41 (4) (*a*) (*ii*); *Finance Act*, 1939, *s.* 13 (3).—In *Scott-Ellis* v. *C. I. R.* (1947), Taxation Reports 177,

a novel point arose as to the bearing of section 13 (3) of the Finance Act, 1939, upon section 41 (4) (a) (ii) of the Finance Act, 1938. In section 41 (4) (a) of the 1938 Act—which forms part of a group of sections dealing with avoidance of tax by devices connected with settlements—the expression "income arising under a settlement" is defined. It is to include, *inter alia,* so much of any income of a body corporate which has been the subject of a direction under the Companies surtax legislation as has been apportioned to the trustees of, or a beneficiary under, the settlement in question. But the definition goes further. If an apportionment has not, in fact, been made but could have been made had the body corporate been incorporated in the United Kingdom, the income arising under a settlement is to be taken to include so much of the income of the body corporate as could have been apportioned to the trustees of, or a beneficiary under, the settlement if the incorporation of the body corporate in the United Kingdom had brought it within the scope of the companies surtax legislation. Section 13 (3) of the Finance Act, 1939, is concerned with sub-apportionments resulting from the "chain of companies" provisions of the Finance Act, 1927. The effect of these provisions is, as is well known, that where a member of a company in respect of which there has been a "direction" is itself a privately controlled company, the apportionment can be carried through to the members of the member company, and so on to the end of the chain. Section 13 (3) of the 1939 Act, which was found by the learned Judge in *Scott-Ellis' Case* above, "extremely difficult to understand or to interpret", provides that:—

> "... any reference in any enactment to apportioning income ... for the purposes of ... section 21 (of the Finance Act, 1922) or of the ... First Schedule (to the 1922 Act) shall be construed as a reference not only to apportioning by means of an original apportionment but also to apportioning by means of an original apportionment together with one or more sub-apportionments or series of sub-apportionments",

and ends by laying it down that, in ascertaining, under section 19 (1) (c) of the Finance Act, 1936, whether income could be apportioned among not more than five persons, account shall be taken only of persons "to whom income could be finally apportioned as a result of the whole process of apportionment and sub-apportionment". The question which arose in *Scott-Ellis' Case* was, in brief, whether these provisions had the effect of enlarging the effect of section 41 (4) (a) (ii) of the 1938 Act in so far as it relates to companies not, in fact, incorporated in the United Kingdom.

The material facts can be summarised as follows: The taxpayer, X, was the settlor in relation to a settlement of which a Canadian company, A, was the trustee. Company A held virtually all the shares in another Canadian company, B. Company B held an interest in five other overseas companies, C, D, E, F and G. It was common ground that the income arising under the settlement included the income of Company B, since, had that company been incorporated in the United Kingdom, its income could have been apportioned to Company A, which was the trustee of the settlement in question. But the Revenue Authorities went further and contended that, by reason of section 13 (3) of the 1939 Act, the income arising under the settlement must be taken to include also the incomes of Companies C, D, E, F and G. To this it was replied that the incomes of these five companies could not, had they been incorporated in the United Kingdom, have been apportioned either to the trustee of, or a beneficiary under, the settlement. In each case the apportionment would have had to be an apportionment to Company B. That company was itself a company not incorporated in the United Kingdom, so that it was outside the scope of the Companies surtax legislation and, therefore, outside the chain of companies provisions of

the Finance Act, 1927. Hence, the apportionment would stop at Company B and there would be no room for a sub-apportionment to the trustee, Company A. This reasoning found favour with Atkinson, J., who held that there was nothing in section 13 (3) of the 1939 Act which had the effect of requiring section 41 (4) (a) (ii) of the 1938 Act to be applied on the footing that each body corporate involved must be considered as notionally incorporated in the United Kingdom. Only on that assumption—in the view of the learned Judge, an unwarranted assumption—could the Crown surmount the obstacle presented by the fact that Company B, a company not incorporated in the United Kingdom, was interposed between the other five companies and Company A. The learned Judge having expressed the hope that the case might go further, counsel for the Crown aptly observed: "It is very much in the nature of a lottery, my Lord".

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6. *LANDLORD AND TENANT CASES*

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law, and J. T. PLUME, Barrister-at-Law

Furnished Houses (Rent Control) Act, 1946—*jurisdiction of Rent Tribunals.*—Two Divisional Court decisions recently reported are important as defining the limits of the jurisdiction of rent tribunals under the Furnished Houses (Rent Control) Act, 1946.

In *R.* v. *Hampstead and St. Pancras Rent Tribunal* (1947), 63 T. L. R. 301, it was held that a tribunal only has jurisdiction to entertain the reference to it of contracts of tenancy whereunder the landlord is under a contractual obligation to provide services or furniture: if there is no contractual obligation to provide the services or the furniture then the rent reserved by the lease or agreement has nothing to do with the attendance or the furniture. That was a case where the lease had been entered into after the 1946 Act was passed and a printed form was used wherein all words imposing upon the landlords any obligation to provide furniture or services had been struck out, and the Lord Chief Justice commented that there is nothing wrong in people altering their business affairs so as to put transactions outside a particular Act of Parliament.

The flats in this case included built-in electric panel fires and immersion heaters which had apparently been installed in place of central hot water, the tenants paying for the electricity consumed by these appliances. The Divisional Court rejected without hesitation the suggestion that these appliances (which of course were supplied as part of the building, so that some portion of the rent could have been said to be in respect of them) were furniture.

It was suggested that there was some collateral agreement as to what the tenants should have, but the Lord Chief Justice pointed out that the rent reserved was the rent for what was demised, and nothing else. If there was a dispute as to whether the landlord had performed his contract, whether under the lease or under a collateral agreement, that was a matter for a claim for damages in other proceedings before a Court of law. If a case came properly before a rent tribunal because the landlord had contracted to provide furniture or services, the tribunal had no power to reduce the rent merely because the landlord is not providing what he has contracted to provide. The tribunal has to see what the lease provides for and decide whether the rent is a fair rent for the premises with those amenities which the landlord has undertaken to provide.

R. v. *Paddington and St. Marylebone Rent Tribunal* (1947), 63 T. L. R. 303, affirmed the principle laid down in the earlier case that the tribunal only has jurisdiction in cases where the landlord has contracted to provide services or furniture in the contract of tenancy, and Atkinson, J., pointed out that the form which is sent out to lessees for them to fill up is asking the wrong question when it asks for information as to " services provided for you by the lessor ". It should ask what services are contracted for, not what are provided. It may be noted in this connection that the Regulations made by the Minister of Health under this Act, namely the Furnished Houses (Rent Control) Regulations, 1946, prescribe among the " Particulars concerning which lessors may by notice be required to give information " the item " Services provided by the lessor, for the use of the lessee ", but reference to section 2 (1) of the Act shows that the prescribed particulars have to be " particulars relating to the contract ". Similarly the Regulations made by the Minister set out " Particulars to be entered in the register kept by the local authority " and these include the item " Services provided by the lessor ", but what section 3 (2) of the Act says the register is to show is " the prescribed particulars with regard to the contract ".

An even more important point decided in this case, however, is that where the premises are a controlled dwelling-house within the Rent Restrictions Acts no power is conferred on rent tribunals to reduce the rent of premises below their standard. Thus is settled, subject to appeal to a higher tribunal, a matter which has exercised the minds of all who have been concerned with the operation of this Act ever since the statute was passed. Although where a substantial part of the rent is attributable to furniture or to services in the nature of personal attendance the letting is taken out of the Rent Restrictions Acts altogether and only the Act of 1946 can control the amount of rent charged, there is an intermediate class where there is some furniture or service contracted to be provided but not such or of such substantiality as to take the letting out of the Rent Restrictions Acts. The Divisional Court has held that in no case can the Tribunal fix a rent which is less than the standard rent. Actually the Lord Chief Justice and Atkinson, J., do not, in their judgments, deal quite with the same class of case, though they enunciate the same principle. The Lord Chief Justice cites the example, " Where a house, the standard rent of which is £*x*, is let for £*x* + *y*, £*y* representing the use of furniture or services, they can deal with £*y* as they like, but the total rent must not be reduced below £*x* ". This is clearly dealing with the class of case where the letting is with substantial furniture or attendance so as to take the case out of the Rent Restrictions Acts altogether, otherwise there could be no £*y*. Atkinson, J., on the other hand, appears to be addressing his mind rather to those cases which, by reason of the nature of the services or the insubstantiality of the quantity of furniture or services, fall within the Rent Restrictions Acts as well as the 1946 Act: in those cases the Rent Restrictions Acts forbid more than the recoverable rent under those Acts to be charged, and the Divisional Court forbids the tribunal to fix anything less, and so the result is that the tribunal can do nothing with the rent at all.

Before leaving the consideration of these two cases the actual provision of section 7 of the 1946 Act should be looked at to see how this last issue ever arose. That section, after abrogating sections 9 and 10 of the 1920 Act as regards rents registered under the new Act, goes on to say, " but save as aforesaid nothing in this Act shall affect any provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939 ". One view of this, and the view that rent tribunals generally have been acting on, is that as the Rent Restrictions Acts nowhere compel a landlord to charge the full recoverable rent, a tribunal could go ahead and fix something lower

as the rent without " affecting the provisions of " the Rent Restrictions Acts. The Divisional Court, in refuting this argument, has drawn attention to the case where a contract of letting which falls both within the Rent Restrictions Acts and the 1946 Act has come to an end and the tenant holds over as statutory tenant. The House of Lords in *Regional Properties* v. *Oxley,* [1945] A. C. 347, has laid down in the clearest terms the liability of such a tenant to pay the standard rent, whatever the advantages he used to enjoy under the expired contract. Yet if a reduction of the rent to a figure below the standard rent had been validly made under the 1946 Act, that rent would be registered under section 3 of the Act, and by section 4 (1) it would be illegal to receive any payment for rent for any subsequent period in excess of the registered rent. The Divisional Court has pointed out that the landlord would thus be deprived of a right which he had under the Rent Restrictions Acts, which is the very thing that section 7 says nothing in the Act is to do.

(Rent Restrictions Guide, 2nd ed., p. 77.)

Rent Restrictions Acts—landlord claiming possession for his own occupation—misrepresentation to tenant resulting in tenant consenting to order for possession—tenant's claim for compensation—observations on landlord's duty when claiming possession for own occupation—" consent " orders.—In the case of *Thorne* v. *Smith* (1947), 63 T. L. R. 55, the Court of Appeal considered the meaning of section 5 (6) of the 1920 Act. That sub-section provides that " where a landlord has obtained an order or judgment for possession " on the ground that he requires a dwelling-house for his own occupation and it subsequently appears that the order was obtained by misrepresentation, the Court may award the former tenant compensation for damage or loss sustained by him. The County Court Judge found that the landlord had induced the tenant to submit to an order for possession being made against him by misrepresenting to the tenant that he required the house for his own occupation when in fact he merely wished to sell it with vacant possession. The Judge held that he could not award compensation by reason of the fact that, in his view, the order for possession had not been obtained by the misrepresentation, although it was the misrepresentation which made the tenant consent to judgment.

The Court of Appeal held that the tenant was entitled to damages (which had been assessed at £180 15s. 4d.), on the ground that, although the misrepresentation was made to the tenant and not to the Judge, the landlord had nevertheless obtained the order by misrepresentation within the meaning of the sub-section.

Scott, L.J., observed that Parliament, in enacting sub-section (6) was " conferring two new substantive rights to money compensation: (1) for mere misrepresentation, that is, without proof by the claimant of any fraud; and (2) for non-disclosure of material facts ". He went on to say that the sub-section had " particular significance, for it treats the landlord's claim to recover possession as analogous to the claim by the assured against the insurer, and, therefore as one calling for ' the utmost good faith ' on the part of the landlord ".

On behalf of the landlord a further question was raised as to whether the order for possession was not itself invalid by reason of the fact that the Judge had never inquired into the circumstances of the case. It was argued that as the order had been made " by consent ", the Judge could not have satisfied himself that it was reasonable to make the order, he being in possession of none of the facts. The case of *Barton* v. *Fincham,* [1921] 2 K. B. 291, was relied upon. However, it was held that in a case such

as was before the Court, where the tenant was legally represented and where he had been satisfied by the landlord that the latter had a good claim to possession, the Judge was entitled to make an order without further inquiry. Somervell, L.J., expressed the view that the expression " consent order " might suggest some compromise or arrangement which was inconsistent with the provisions of the Acts and that it would be advisable to avoid the use of the word " consent ".

(Rent Restrictions Guide, 2nd ed., p. 64.)

Oral permission to occupy for life—what interest created—Small Tenements Recovery Act, 1838—*Law of Property Act,* 1925, *s.* 54.—The case of *Buck* v. *Howarth,* [1947] 1 All E. R. 342, is a decision of the Divisional Court on an appeal by way of case stated and raises the question of the effect of a verbal arrangement under which the respondent was told that he could live in a house " until he died ".

The respondent lived with his wife in her house until she died. The wife bequeathed the house to her son who, on her death, told the respondent, his father, that he could live in it until he died. The respondent remained in occupation and paid no rent, the son paying the rates. By deed of gift the son gave the house to the appellant. The appellant paid the rates and received no rent from the respondent. Proceedings were commenced under the Small Tenements Recovery Act, 1838, by the appellant for a warrant for possession which the justices refused, they being of the opinion that a tenancy for life had been granted to the respondent.

The main point which came under consideration in the Divisional Court was whether the respondent's interest in the house was any more than a licence, for in such a case the proceedings could not have been maintained under the Act of 1838, section 1 of which gives the Court power to issue its warrant only in cases where the occupier has been a tenant. The Court came to the conclusion that this case was resolved by section 54 of the Law of Property Act, 1925, and the case of *Anderson* v. *Midland Ry.* (1861), 2 E. & E. 614, and held that the respondent occupied as a tenant-at-will, he having an uncertain interest in the house from which the law would presume such a tenancy. The Court accordingly ordered that the warrant should issue.

It is to be noted that the Court refused to allow the successful appellant costs, holding that it would have been better to have brought the action in the county court. It would seem from this that when there is a substantial point of law involved, a landlord who does not wish to run the risk of being deprived of his costs on appeal would be well advised not to employ the procedure provided by the Act of 1838.

(Woodfall, 24th ed., p. 1116.)

Forfeiture of lease—unlawful sub-letting—attempt to register premises under Defence Regulations and legalise sub-letting.—In the case of *Ouzman* v. *Kennedy,* [1947] 1 All E. R. 99, the Court of Appeal considered the effect of a manœuvre by a tenant to regularise unlawful sub-letting in respect of which proceedings had already been begun by the landlord.

In breach of covenant the tenant sub-let. The landlord brought proceedings in the county court claiming forfeiture of the lease. The tenant, after the commencement of the proceedings, made application to the local authority to have the premises registered under Defence Regulation 68CB. That regulation provides (*inter alia*) that if premises are registered thereunder a tenant may lawfully sub-let notwithstanding any provision to the

contrary in the tenancy agreement. The application by the tenant was refused. The tenant then applied to the county court for an order adjourning generally the landlord's claim for possession pending an application by him to the High Court for an order for mandamus to the local authority to compel them to register the premises under Regulation 68CB. The County Court Judge granted the adjournment.

The Court of Appeal held that the landlord had a vested right of action for possession before the tenant had made his application to the local authority. It further held that, even if an order for mandamus were granted and the premises were subsequently registered, Regulation 68CB would have no retrospective effect and would not relieve the tenant of the consequences of breaches of covenant committed before registration. The appeal was therefore allowed.

(Woodfall, 24th ed., p. 911; Rent Restrictions Guide, 2nd ed., p. 155.)

Breach of covenant—measure of damages—breach by converting into flats—cost of reconversion—relief from forfeiture.—Two questions of practical importance were considered by Atkinson, J., in the case of *Eyre* v. *Rea* (1947), 63 T. L. R. 171. In 1946 the defendant took an assignment of a lease which contained a covenant " not to use the premises otherwise than as a dwelling-house in one occupation ". Immediately on obtaining the assignment the defendant converted the premises into flats. The landlord sued for a declaration of forfeiture and for damages based on the cost of restoring the premises to their original condition. The defendant claimed relief under section 146 of the Law of Property Act, 1925, but gave no undertaking to remedy the breach, indeed he proposed to continue to use the premises as flats during the remainder of the term. The learned Judge pointed out that section 146 gave the Court absolute discretion as to whether it should grant relief or not, but went on to state that he knew of no case where relief had been granted on the basis that the lessee could continue in breach. The principles upon which relief should be granted as laid down by Cozens-Hardy, M.R., in *Rose* v. *Hyman*, [1911] 2 K. B. 234, at p. 241, were quoted. These principles show quite clearly that the tenant must undertake not to repeat or continue the breach and so far as is possible remedy it and make good any waste.

The learned Judge refused to exercise his discretion in the defendant's favour and said that it could not be the duty of the Court to turn a wrong of that kind into a right.

On behalf of the defendant it was argued that the measure of damages was not the cost of restoring the premises into their original condition but the damage to the reversion. It was said that the premises had not been diminished in value but rather enhanced by the conversion. Section 18 of the Landlord and Tenant Act, 1927, was relied upon. The Court pointed out that that section was merely limited to damages for breach of a covenant to repair and had no application to a breach of any other covenant. However, it was argued that apart from that section the landlord was not entitled to damages as he had suffered none by reason of the fact that the premises as handed back to him could be let at a higher rent and were of more value than the unconverted premises. The Court refused to entertain this argument and held that the landlord was entitled to recover the cost of restoring the premises to the condition in which he was entitled to have them together with a sum to cover the loss of use of the premises while they were being restored.

(Woodfall, 24th ed., pp. 724, 934.)

Notice to quit—effect of subsequent notice after prior valid notice.—In *Loewenthal* v. *Vanhoute,* [1947] 1 All E. R. 116, Denning, J., had to consider whether a valid notice to quit was waived by the serving of a subsequent notice. The tenant was a weekly tenant of a furnished flat. On September 14, 1946, the landlord served a valid notice to quit expiring on September 21, 1946. On September 30 the tenants referred the contract of tenancy to the Rent Tribunal under the Furnished Houses (Rent Control) Act, 1946. On October 4 the landlord's solicitors served a further notice to quit. The landlord contended that the first notice was valid and effectively prevented the tenants obtaining the three months' security of tenure under the 1946 Act because it expired before the tenants' application had been lodged with the Rent Tribunal. For the tenants it was contended that the serving of the subsequent notice to quit on October 4 waived the first notice; they relied on a passage in *Woodfall,* 24th ed., at p. 981, which says: "Generally speaking, giving a second notice to quit amounts to a waiver of a notice previously given". This passage is based upon the dictum of Lord Ellenborough, C.J., in *Doe* d. *Brierley* v. *Palmer* (1812), 16 East 53, at p. 56, but has been disapproved by Denning, J. "In my opinion", says Denning, J., "the law is well settled now that, when a forfeiture of a lease is incurred, the lease is voidable and not void, and in those circumstances the giving of a notice to quit may recognise the subsistence of the lease and may, therefore, waive the forfeiture, but in the case where a tenancy is determined by a notice to quit, the position is entirely different. . . . When a valid notice has been given, a new tenancy can be created only by an express or implied agreement. A subsequent notice to quit is of no effect unless other circumstances form the basis for inferring a new tenancy having been created after the expiry of the first notice. Applying that test in the present case, it is plain that there was no agreement, express or implied or to be inferred, for any new tenancy. The tenancy expired on September 21. On September 23, the tenants offered rent. It was refused. That showed plainly that the landlord was not going to create a new tenancy, and the mere fact that a solicitor, in order to get possession, gave another notice to quit, is not, in my judgment, any reason for inferring any agreement for a new tenancy."

The older authorities often speak of "waiver" of a notice to quit, but this is really a misnomer, it being a question whether there has been assent to a new tenancy to take effect upon the expiration of the old one: *Tayleur* v. *Wildin* (1868), L. R. 3 Ex. 303.

(Woodfall, 24th ed., pp. 980, 981.)

THE LIBRARY

Income Tax Case Law. By A. Farnsworth. London: Stevens & Sons, Ltd. xxiii and 169 and 6 pp. (17s. 6d. net.)

Lord Simon will command general assent when he says, in his Foreword, that "Dr. Farnsworth's book will be of much interest to Income Tax lawyers and of considerable help to all who do not want to fail to see the wood while digging at the roots of an individual tree". Lord Simon adds, with an almost audible sigh, that "it is rather a gloomy wood". So it may often appear, but Dr. Farnsworth has performed the very difficult feat of making Income Tax interesting, while yet maintaining a high standard of precision in the discussion of Income Tax enactments and their interpretation by the Courts. His purpose is to show that, bewildering as is the profusion of statutes and decisions, certain principles emerge from them—

principles which he illustrates with singular clarity and skill by reference to a limited number of selected topics. These include such intriguing questions as "'Fact' or 'Law' in Cases Stated", the residence and domicil of corporations, double taxation of foreign dividends, tax-free annuities, and capitalised interest. There are also valuable chapters on domicil of choice, the "carrying on of business" by a foreign corporation, and "legal evasion of surtax". The whole subject is introduced by a masterly review of outstanding decisions under the rubric "A Century of Judicial Interpretation", while, at the end, the reader is given a *bonne bouche* in the shape of a chapter on "corporate dividends in American law". Dr. Farnsworth deserves the gratitude of his readers, not only for his skill in excavating principles from the ever-growing mound of Income Tax law, but for his clarity in expounding them. In a book of well under two hundred pages he covers an immense amount of difficult ground, and sheds welcome light on many dark places.

L. J. S.

Covenants Affecting Land. By SIR LANCELOT H. ELPHINSTONE. Solicitors' Law Stationery Society, Ltd. xxxii and 196 and 14 pp. (30s.)

The author is well known, both as joint-editor of the well-known *Prideaux's Precedents* (23rd ed.), and as editor of the *Conveyancers' Year Books* for the years 1940–1945.

The statement of the law in this book is in the form of a digest with notes. This arrangement may not recommend itself to everyone, but the work is certainly a valuable contribution to the subject, and there is a good deal to be said in favour of a clear statement of the author's view of the law, presented lucidly, in relation to a subject of this kind, where the case law is extremely formidable, and it is difficult for a busy practitioner to be certain that he has extracted the correct principle from the cases to which his own research, or some other textbook, has led him.

So far as the present reviewer has been able to test the work, it seems to be accurate and reliable. A few observations may, however, be ventured. For example, having regard to the great importance of the registration of land charges in connection with restricted covenants, it seems strange that according to the index the Land Registration Act is mentioned on three pages only. A discussion of the Act and its effect might have been expected. The difficult subject of the covenants for quiet enjoyment surely deserves some mention as a "covenant affecting land".

Modern decisions have given cause for reflection concerning the efficacy of covenants which are intended to benefit large areas of land; and the author has provided a form which surmounts difficulties of this kind. It would, however, be an improvement if the footnotes to the form in question (Appendix B, Form 1) contained a reference to Article 53. Footnote 7 to Article 49 should contain a reference to footnote 10 to Article 53 or to the purport of the cases cited in the last mentioned footnote.

However, it is certain that no two persons would prepare a work on this subject in precisely the same manner, and the microscopic nature of the criticisms in this review form a correct gauge of the reviewers' opinion that there is little to quarrel with, and very much to commend in this work. It will certainly be of very great practical value to conveyancers.

E. O. W.

The Double Taxation Conventions. By F. E. KOCH. Vol. I: Taxation of Income. Stevens & Sons, Ltd. xxiv and 414 and 27 pp. (45s. net.)

Mr. Koch has rendered an important public service by digging deeply into the complicated subject-matter of the Double Taxation Relief Conventions and setting forth the results of his excavations in a manner which will be warmly appreciated by those concerned with the problems presented by these novel international arrangements. The volume under notice deals with the income tax aspect of the matter. It is good news that it is to be followed by a similar commentary

on the Conventions relating to Estate Duty. Mr. Koch expounds seriatim and in detail the provisions of the Tax Conventions with the United States, Canada, Southern Rhodesia, South Africa, Australia and France. Each in turn is analysed and explained, Article by Article, with a lucidity and a wealth of knowledge which will materially ease the path of the harassed practitioner. The Appendices include, not only the text of all the revelant United Kingdom legislation, but also some valuable American material not easily accessible elsewhere. Mr. Koch is to be congratulated upon the successful performance of a laborious but most useful task.

L. J. S.

Key and Elphinstone's Precedents Supplement. By JOHN MILLS, O.B.E., B.A., of Corpus Christi College, Cambridge, and the Middle Temple, Barrister-at-Law. 1947. London: Sweet & Maxwell, Ltd., 2 & 3 Chancery Lane. pp. xviii and 164. (17s. 6d.)

This supplement brings the law of the Precedents down to May 31, 1947. It contains Part I, a General Survey; Part II, Notanda and Addenda, being a detailed noter-up for the individual notes in the principal volumes; Part III, Statutory Matter, being connected short summaries of the most important legislative changes; and Part IV, Additional Precedents.

So far as the Precedents are concerned subscribers will not find anything very unfamiliar as they appear to be based on what has already appeared over the last seven years in this journal. They are, of course, fitted into their relevant places in the principal work. Our criticism here would be that a few more of these precedents might have been included.

Part III will also contain some familiar matter as some of the summaries are clearly taken from *The Conveyancer* and edited for the purposes of this supplement. The summaries are alphabetically and most conveniently arranged. We think that users of *K. & E.* will find them valuable as a way of keeping track of the relevant points in this period of legislative activity.

Part II, so far as we have tested it, is accurate and effective in bringing the notes, and where necessary the precedents, into line with developments in the law since 1939. No doubt this is the part of the supplement which will be used most and it appears to us to be well done. Users of *K. & E.* should always consult the supplement before using a precedent. In fact it would be useful to note in the principal work where the supplement applies. It is quite surprising how much has been affected except in Vol. III.

Hayes and Jarman's Forms of Wills (17th edition). By CLAUDE EUSTACE SHEBBEARE, of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd., 2 & 3 Chancery Lane. 1947. pp. cxxxv and 464, with Supplement to May 31, 1947. (£2 12s. 6d.)

The seventeenth edition of *Hayes & Jarman* and the fourth to be edited by Mr. C. E. Shebbeare does not call for any extended notice in this Journal. The learned editor points out in his preface that never before in the 112 years of its existence has so long an interval elapsed as between the two last editions of the book, the sixteenth edition being published in 1933. This gap is due to the war and has involved the learned editor in the considerable labour attendant upon bringing the work up to date, though it is only fair to him to say that the MSS. had left his hand some considerable time before publication was possible.

Hayes & Jarman has long been used not only as a precedent book, and for ourselves we feel that more modern forms are often desirable, but also as a standard work on the law of wills. As such it is a most valuable book to have on the shelves and the work of keeping it up to date in this respect is onerous. So far as we have examined it, that work is done with Mr. Shebbeare's customary skill.

This is the Law Series. Patents and Registered Designs. By T. A. BLANCO WHITE, of Lincoln's Inn, Barrister-at-Law. *Trade Marks and Unfair Competition.* By T. A. BLANCO WHITE. *Income Tax.* By C. N. BEATTIE, LL.B., of Lincoln's Inn, Barrister-at-Law. *Hire-Purchase Law.* By MAURICE SHARE, B.A.(oxon), of Gray's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1947. (4s. net each.)

This is an attractively got up series of well printed paper-covered booklets limited to special topics. The sort of thing that a business man would like to know something about. They appear to be clearly written and are roughly of the size between seventy and one hundred small pages. They vary in the practice of citation of authorities, but we feel that primarily it is not the intention to cite cases. For anyone who wants to "get outside" the main outlines of the subject in the course of a couple of hours or so these are admirable.

PERIODICAL LITERATURE

Attention may be drawn to the following articles in periodical literature we have received:—

Law Quarterly Review. July, 1947. Stevens & Sons, Ltd.

This number contains two articles of practical interest to the conveyancer. Professor Cheshire and Mr. Fifoot discuss the position of the doctrine of consideration since the observations of Denning, J., in *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* They arrive at the conclusion that the decision clarifies the rules of waiver. The other article is entitled "Is a surety's liability co-extensive with that of the principal debtor?". Mr. R. Else-Mitchell's opinion is that the answer is in the negative. Any lawyer will enjoy Sir Arnold McNair's article on Dr. Johnson and the law.

The Modern Law Review. July, 1947. Stevens & Sons, Ltd.

Two articles are concerned with the practical administration of the new planning legislation. "The New Public Corporations and the Law" by Dr. W. Friedmann, and "Administrative Discretion and Judicial Control" by Mr. G. E. Treves. The second article draws some inspiration from French administrative law, but in the main is a valuable analysis of some English cases. It is a subject of which much more will be heard.

The International Law Quarterly. Vol. 1, No. 1. Stevens & Sons, Ltd. (Annual subscription, £1 10s.)

While this is not normally a subject within our province we feel that we should extend a welcome to this new periodical. It is issued under very illustrious authority. The Honorary Joint Editors are Professor G. C. Cheshire and Dr. C. J. Colombos. The Editorial Committee contains such names as those of Lord du Parcq and Sir Arnold McNair with Sir Cecil Hurst as Chairman. The journal contains the usual features of a law magazine. Its review of case law is not likely to be extensive but it includes matters of conflict of laws and this topic appears in an article entitled "Pleas for a Wider Study of Private International Law" by Professor Cheshire. It is, of course, the private international law side that is of most interest to the conveyancer as things stand at present. This magazine is beautifully got up and printed having regard to the difficulties of the times and we wish it well.

BOOKS RECEIVED

Cambridge Law Journal. 1947. London: Stevens & Sons, Ltd.

Commentaries on the Law of Real Property. By WILLIAM E. WALSH, Professor of Law Emeritus New York University. 3 vols. Matthew Bender & Co. 1947.

It is intended to give a full review in our next issue.